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No. 80-6680

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES RONALD MCELROY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 15, 1981.
CERTIORARI GRANTED OCTOBER 5, 1981.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 19, 1979 Indictment filed.

May 25, 1979 Notice setting Initial Appearance and Arraignment for June 11, 1979 before United States Magistrate Robert C. Mitchell, United States District Court for the Western District of Pennsylvania filed.

June 11, 1979 United States Magistrate Robert C. Mitchell set bond for $25,000 surety.

June 13, 1979 United States Magistrate Robert C. Mitchell appointed Robert Lackey, Assistant Federal Public Defender, as counsel.

June 18, 1979 Defendant appears before United States Magistrate Ila Jeanne Sensenich of the United States District Court for the Western District of Pennsylvania, and pleads not guilty.

August 7, 1979 Trial begins before the Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania.

August 8, 1979 Trial continues.

August 9, 1979 Jury returns a verdict of guilty to Counts 1, 2, and 3 of the Indictment.

October 16, 1979 Sentence dated 10/15/79: Defendant committed to custody of Attorney General for period of 7 years on Count One; Count Three same sentence as Count One; Count Two defendant committed to custody of Attorney General for period of 5 years; said sentences as Counts One, Two, & Three to run concurrently but consecutively with state sentence defendant is now serving, no fine, costs or restitution; defendant to become eligible for parole at such time as parole commission may determine as provided in 18 U.S.C. § 4205(b) (Simmons, J.) CC issued.

October 19, 1979 Notice of Appeal of sentence of October 15, 1979 filed by defendant in United States District Court for the Western District of Pennsylvania.

October 31, 1979 Original Record and Exhibits mailed to United States Court of Appeals for the Third Circuit.

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

March 21, 1980 Argued in United States Court of Appeals for the Third Circuit before Seitz, Chief Judge, Garth and Higgenbotham, Circuit Judges.

November 17, 1980 Argued in banc before the Court of Appeals for the Third Circuit.

March 17, 1981 Opinion filed by Court of Appeals for the Third Circuit.

March 17, 1981 Judgment on Rehearing filed by United States Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Criminal No. 79-32

(18 U.S.C. Sections 2312 and 2314)

UNITED STATES OF AMERICA

v.

CHARLES RONALD McELROY
a/k/a WILLIAM JONES

The Grand Jury charges:

Begining on or about October 16, 1978, in Youngstown, Ohio, and continuing thereafter in the Western District of Pennsylvania, CHARLES RONALD McELROY a/k/a WILLIAM JONES, did with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce from Youngstown, Ohio, to the Western District of Pennsylvania, a certain falsely made and forged security, to wit, Check No. 2441, drawn on the Dollar Savings and Trust Company, Youngstown, Ohio, upon the account of L.I.U.N.A. Local 125, Members Savings Account, 319 W. Rayen Avenue, Youngstown, Ohio, 44502, payable in the amount of $6,706.00, dated October 17, 1978, made payable to Don Allen Chevrolet, Co., and signed James Southland, and the Defendant, CHARLES RONALD McELROY a/k/a WILLIAM JONES then well knew the same to have been falsely made and forged.

In violation of Title 18, United States Code, Section 2314.

COUNT TWO

The Grand Jury further charges:

On or about October 17, 1978, CHARLES RONALD McELROY a/k/a WILLIAM JONES transported in

interstate commerce a stolen motor vehicle, that is, a 1974 Chevrolet Corvette, V.I.N. 1237J45421650, from the Western District of Pennsylvania to the State of Ohio, and he then knew the motor vehicle to have been stolen.

In violation of Title 18, United States Code, Section 2312.

COUNT THREE

The Grand Jury further charges:

Beginning on or about December 12, 1978, in Youngstown, Ohio, and continuing thereafter in the Western District of Pennsylvania, CHARLES RONALD McELROY a/k/a WILLIAM JONES, did with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce from Youngstown, Ohio, to the Western District of Pennsylvania, a certain falsely made and forged security, to wit, Check No. 2426, drawn on the Dollar Savings and Trust Company, Youngstown, Ohio, upon the account of L.I.U.N.A. Local 125, Members Savings Account, 319 W. Rayen Avenue, Youngstown, Ohio, 44502, payable in the amount of $6,695.00, dated December 8, 1978, made payable to Rini Marine Sales/SVC and signed James Southland, and the Defendant, CHARLES RONALD McELROY a/k/a WILLIAM JONES, then well knew the same to have been falsely made and forged.

In violation of Title 18, United States Code, Section 2314.

A True Bill,

/s/
Foreman

/s/ Robert J. Cindrich
ROBERT J. CINDRICH
United States Attorney

[46] ALBERT E. GIRARDI,

called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Mr. Girardi, could you please advise the jury if you are employed?

A Yes, I am employed.

Q Where are you employed, sir?

A Don Allen Chevrolet.

Q Where is that located?

A Baum and Liberty in Pittsburgh.

Q And were you employed there in October of 1978?

A Yes, sir.

Q How long have you been a salesman?

A At that point, about a year and a month.

Q Perhaps I really was putting the rabbit in the hat. You are a salesman there?

A I am a salesman.

THE COURT: What is your first name, please?

THE WITNESS: Albert.

THE COURT: Go right ahead.

BY MR. GARRETT:

Q Now, do you recall, sir, back in October of 1978, [47] an occasion when an individual came in and talked to you about purchasing a Chevrolet Corvette?

A Yes, I do.

Q Could you please describe for the jury how that transaction occurred?

A Yes. I greeted an individual on the lot that day.

Q Do you remember what the day was?

A It was October 16.

Q I am sorry. Go ahead.

A The person inquired about being interested in Corvettes, and I had asked him if it was a used or new one, and he indicated a used. I explained to him I had one on hand. It was a '74 model. It was the only one I had and I would be happy to show it to him, which I did. I took the individual to the Corvette, showed him the Corvette. We then test drove the Corvette, and after the test drive, the individual indicated that he was very much interested and it was what he was looking for and that he would return the next morning with a credit union check to take possession of the car.

Q Now, did he tell you what his name was, sir?

A Yes, sir. William Jones.

Q And did he give you an address?

A At that point, yes. Yes, he did.

MR. GARRETT: Now, may we have this marked [48] Government's Exhibit 1.

(Whereupon, Government's Exhibit No. 1 was marked for identification.)

BY MR. GARRETT:

Q Now, I show you a document entitled "Retail Order for Motor Vehicle," which has been marked for identification as Government's Exhibit 1 and ask you if you can identify that, please, sir?

A Yes, I can.

Q What is that?

A Pardon?

Q Go ahead. What is that?

A It is a retail order for the particular car that I just discussed showing Mr. Jones.

Q And does that reflect an address for the customer?

A Yes.

Q What was the address that he told you?

A 15419 Hollywood Drive, Warrenville Heights, Ohio.

Q When he came in and told you he wanted to buy this car, did he tell you where he was coming from?

A Yes.

Q Where was that, sir?

A He said he lived in Ohio ad worked out of the Pittsburgh area.

Q And did he tell you where he was going to get a [49] check?

A From his credit union, the Pennsylvania Area Railroad.

Q Now, in connection with his interest in that car, did you tell him anything about how much the amount of the car would be?

A Yes, we discussed the price. He indicated that he would be back the next morning with the credit union check, and I advised him to go ahead and write a retail order so I could hold the car until that time.

Q Did you tell him to do that?

A Yes, sir.

Q And he told you that he would go get a check to complete the transaction; is that correct?

A Yes, sir.

MR. GARRETT: May I have this check marked Government's Exhibit 2?

(Whereupon, Government's Exhibit No. 2 was marked for identification.)

THE COURT: For the record, I think the witness's name is spelled G-i-r-a-r-d-i, isn't it?

THE WITNESS: Yes, sir.

MR. GARRETT: Did Your Honor want to look at Exhibit 2?

(Whereupon, counsel handed the document to the [50] court.)

BY MR. GARRETT:

Q All right. Now, the man told you he would come back; is that correct?

A Yes, sir.

Q And did he come back?

A The next day.

Q What day would that have been?

A The 17th of October.

Q I show you a check which has been marked for identification as Government Exhibit 2. Can you identify that, please, sir?

A Yes, sir. That is the one that he gave me.

Q All right. When did he come in on the 17th?

A It was just roughly 6, 6:30.

Q What happened when he came in at that time?

A I completed the paperwork on the car. I was busy for a while, but he had waited for me. I came in, completed the paperwork on the car, except for the check, along with ID which I took to management. They reviewed what documents I had and said, "Go ahead. Let the car go and put a license plate on it."

Q You mentioned that he showed you some kind of identification?

A Yes.

[51] Q What did he show you, do you recollect?

A He had an Ohio registration to an automobile, and I believe a retail buyer's order for an automobile from Ohio.

MR. GARRETT: May I have this marked as Government's Exhibit 3, please?

(Whereupon, Government's Exhibit No. 3 was marked for identification.)

BY MR. GARRETT:

Q I show you a document entitled "Passenger Car Registration Application, State of Ohio, Bureau of Motor Vehicles," which has been marked for identification as Government's Exhibit 3. Can you identify that document, sir?

A It looks similar to what I looked at, but, you know, I couldn't say positively it is the same one.

Q When you say you looked at it, you mean at what point?

A I don't understand your question.

Q You said that looked similar to what you looked at. What do you mean you looked at?

A The identification that was given to me on delivery of the car.

Q I see. In other words, that man who identified himself as William Jones provided that for purposes of identification?

A Something similar. I can't say that is exactly [52] what I looked at.

Q Now, you mentioned—

THE COURT: I think we ought to identify Exhibit 3, though. What is it?

MR. GARRETT: It is a document from the State of Ohio, an application for motor vehicle registration.

BY MR. GARRETT:

Q Now, you mentioned, Mr. Girardi, that you completed documentation on the Corvette which was at issue here?

A Yes, sir.

Q What was the documentation?

A Retail buyer's order, power of attorney, the warranty, and the registration, automobile registration, temporary registration.

MR. GARRETT: May I have these documents marked Government's Exhibits 4, 5 and 6?

(Whereupon, Government's Exhibits Nos. 4, 5 and 6 were marked for identification.)

BY MR. GARRETT:

Q Mr. Girardi, I show you a document entitled "Temporary Registration Certificate," which has been marked for identification as Government's Exhibit 4 and ask you if you can identify that, sir?

A Yes, I feel that I can.

Q All right. Is that some of the documentation on [53] this?

A Yes, that would be the temporary registration of the vehicle.

Q Now, I show you a document which is entitled "Limited Warranty, Used Motor Vehicle" marked for identification as Government's Exhibit 5 and ask you if you can identify that, sir?

A Yes, sir, I can identify it.

Q What is it, please?

A It is a 30-day limited warranty that we issue with a sold car.

Q I show you a form, a title release form which has been marked for identification as Government's Exhibit 6 and ask you if you can identify that, please, sir?

A Yes, sir, I can.

Q What is that?

A It is a motor vehicle power of attorney is what it is. There are two different forms here. It is used to do the title work in the customer's absence.

Q Was that one of the documents that was prepared in connection with this transaction?

A Yes, sir.

Q Now, I ask you to look at these—

MR. LACKEY: Excuse me, Your Honor. Could Mr. Garrett just stand to the side so we could see the witness?

[54] MR. GARRETT: I will try to stay out of Mr. Lackey's way.

THE COURT: I think if you stood over here.

MR. GARRETT: You let me know if I get in anybody's way.

THE COURT: Is that okay, Mr. Lackey?

MR. LACKEY: Perfect.

BY MR. GARRETT:

Q Mr. Girardi, I direct your attention to Government's Exhibit 1, Government's Exhibits 4, 5 and 6 and

ask you to tell the jury the manner in which those documents were filled out?

A Well, they were filled out by me at my desk, and the individual buying the car fills them out in my presence.

Q Please take Government's Exhibit 1. Would you show the jury by pointing where the writing is that you put on that document? Pick it up and show it to them so they can see it.

A Everything up here all the way down to these signatures, this is all my writing (witness indicating).

Q Now, who put the signatures on there?

A The individual buying the car along with one of my managers.

Q Now, the top signature was put on by the individual buying the car; is that your testimony?

[55] A Yes, sir.

Q And was that done in your presence?

A Yes, sir.

Q Now, referring you to Government's Exhibit No. 4, what manner was that filled out, please, sir?

A It is filled out by me at my desk and presented to the customer to sign.

Q And did he sign it in your presence?

A Yes, sir.

Q Would you point out to the jury where the signature appears on that document that was put on it by the customer?

A Right here (Witness indicating). This is all my writing.

Q All right. Now, I direct your attention to Government's Exhibit 5, the limited warranty. Can you tell the jury in what fashion that was filled out?

A Same way. It is filled out by me at my desk. Everything here is my writing with the exception of the two signatures down here, one by the purchaser and one by the manager.

Q And was it signed in your presence?

A Yes, sir.

Q Now, I direct your attention to Government's Exhibit 6, the form that says "Title Release" on it. Now, does that show any writing on it?

A No, sir.

[56] Q Is that a signature on it?

A Yes, sir.

Q In what fashion was that signature placed on that document?

A By the customer again. It was presented to him in my presence, and he signed where he was supposed to.

Q Now, I direct your attention specifically to the temporary registration certificate. What is the purpose of issuing that document?

A Well, it is a temporary registration until such time as the person receives the normal one from the Department of Motor Vehicles.

Q Now, in this particular case, was that vehicle to be titled by the Department of Motor Vehicles?

A In Ohio.

Q What do you mean by "in Ohio"? How do you know in Ohio?

A Well, we indicate here on the registration if it is Pennsylvania. There is a different area that is filled out here. When a person from another state purchases, we have to give him that statement from the state in which it will be registered.

Q How did you determine it would be appropriate to write Ohio in this case?

A From the individual buying this car.

[57] Q He told you something?

MR. LACKEY: I object, Your Honor. That is leading.

THE COURT: It is leading.

MR. GARRETT: Well, my question was whether he told you something.

THE COURT: Please rephrase it.

BY MR. GARRETT:

Q Did he communicate anything to you regarding that subject?

A He indicated that he would be registering the car in Ohio.

Q Now, directing your attention to Government's Exhibit 2 which is the check which you previously testified about, was there any writing done on that check in your presence?

A No.

Q That was, I take it, made out when you received it?

A It was made out when I received it, correct.

Q Now, after you completed the paperwork regarding this transaction, what if anything occurred?

A I guess everything was signed, and I took the check in for approval and filled out a temporary license plate, put it on the car, and Mr. Jones took off with the car.

Q Now, how long would you say that you and Mr. Jones [58] were together during the period of time that—I should say you and the person who called himself Mr. Jones. How long were you together during the period of time when you were discussing this transaction of buying the car and writing the paperwork and what not?

A I would say the first time, 30 minutes; the second time, 20 minutes.

Q And what were your relative positions during this period of time? In other words, how close were you to him?

A We drove in a car for a while, you know, not long; maybe five minutes. In the bulk of the time—Well, I guess 50 percent of the time he was across the desk from me.

Q Now, at some subsequent time, did you have occasion to report this matter to the police?

A You mean afterwards?

Q Yes, sir.

A I think management handled that.

Q But to your knowledge, was it reported to the police?

A Pardon?

Q To your knowledge, was it reported to the police?

A Yes, to my knowledge.

Q And did you talk to any representative of a law enforcement agency?

A You mean between now and last October?

[59] Q Well, after this transaction occurred?

A Maybe a month or two later I talked with the FBI. I can't even recall if it was a month or two months, three months, two weeks.

MR. GARRETT: Excuse me a minute, Your Honor.

THE COURT: Yes.

BY MR. GARRETT:

Q Now, Mr. Girardi, you indicated that this individual came to the Don Allen dealership on two occasions; is that correct?

A Yes.

Q That is the 16th and 17th. Did you see whether or not he was in any other vehicle at any point?

A The first time he came in, he was in a vehicle.

Q Can you describe that car?

A It was like a beige or a tan Chevrolet.

Q Do you know where that car was registered, sir?

A No, sir, I don't

Q Now, after this matter was reported to authorities. did you have occasion to appear at a lineup?

A Yes, I did.

Q And when was that, sir?

A Last Thursday or Friday. I can't remember.

Q And explain for the ladies and gentlemen of the jury what happened at the lineup?

[60] A They had two groups of the people come in, six in a group. We looked at them.

Q Now, in the first group, was there anybody in there that you recognized?

A No.

Q And then there was a second group that was brought in?

A There was a second group who came in, and the number five man in the second group I felt was the same individual.

Q Now, let me just ask you this: The two groups, were they the same groups of people, or were they different groups of people?

A They were different groups.

Q Now, you say the number five man in the second group you felt was the same man?

A Yes, sir.

MR. GARRETT: May we have these photographs marked as Government's Exhibits 7, 8, 9, 10 and 11.

(Whereupon, Government's Exhibits Nos. 7, 8, 9, 10 and 11 were marked for identification.)

BY MR. GARRETT:

Q Now, Mr. Girardi, you said that the number five man—I think that was the term you used.

A Yes, sir.

[61] How did you determine the number that you used? What do you mean by "the number five man"?

A They had numbers on them.

Q I show you these photographs which have been marked for identification as Government's Exhibits 1 through 11 and ask if you can—

THE COURT: Excuse me. I think it is 7 through 11.

MR. GARRETT: I am sorry, what did I say?

BY MR. GARRETT:

Q I show you these photographs which have been marked for identification as Government's Exhibits 7 through 11 and ask if you can identify these photographs?

A It is the same as the lineup.

THE COURT: The first or second lineup?

THE WITNESS: Second one.

BY MR. GARRETT:

Q That is a photograph of the group of men who appeared in the second lineup; is that correct?

A Yes, sir.

Q Now, is the man who represented himself to you as William Jones of Warrenville Heights, Ohio present in court here today?

A Yes, sir.

Q Would you please indicate who he is?

A The gentleman sitting right next to the man in the [62] blue suit here.

MR. GARRETT: Referring to, I believe, for the record, the defendant Charles Ronald McElroy.

Mr. Lackey, do you agree?

MR. LACKEY: Yes.

BY MR. GARRETT:

Q Now, is that the individual who is the number five man in the lineup? Is the defendant, the number five man, present in the courtroom here? Is he the individual who is the number five man in the lineup when you made that identification?

A I think so.

Q As far as you know he is; right?

A Yes.

MR. LACKEY: I object, Your Honor. That is leading.

THE COURT: It is leading and you have got to be a little more specific. You have got to do more than

just think so. Of course, I don't want to put words in your mouth, but I want you to tell us what you think.

BY MR. GARRETT:

Q You saw that lineup; is that correct?
A Yes, sir.
Q You picked the number five man; is that correct?
A Yes, sir.
Q And today you say that the defendant is the man [63] who appeared as William Jones?
A Yes.

MR. LACKEY: I object, Your Honor, as to him continuing to repeat his testimony.

THE COURT: Well, the objection is sustained, but don't repeat your testimony.

MR. GARRETT: Maybe what I should do is put the question like this: The man you picked out in the lineup, what were you picking him out in connection with?

THE WITNESS: With this whole deal here, the checks and the car sale.

THE COURT: You have to lift your voice up a little bit. Did you hear that last word he said?

MR. GARRETT: Thank you. I have no further questions at this time.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. LACKEY:

Q At this lineup, the first and the second, were you given small cards or sheets of paper on which you were to mark your choice? Isn't that correct?
A Yes, sir.
Q And on these cards they had numbers from one through eight for your choice?
A Yes.
[64] Q And there were six men in each lineup?
A Yes.

Q And you were told, isn't it true, to circle the number of the person you identified as the person who was at Don Allen Chevrolet?

A Right.

Q And which number did you circle in the first lineup?

A I circled number eight on both occasions.

Q Number eight was the choice you were to mark if you could not make an identification; is that right?

A That is right.

Q Which number did you circle for the second lineup?

A Eight.

Q Now, this man who identified himself as Mr. Jones told you that he worked in the Pittsburgh area?

A He worked out of Ohio in the Pittsburgh area.

MR. LACKEY: No further questions.

THE COURT: Any redirect?

MR. GARRETT: Yes, sir.

REDIRECT EXAMINATION

BY MR. GARRETT:

Q When you say, "Out of Ohio in the Pittsburgh area"—Is that what you said?

[65] A Well, he lived in Ohio and was working out of the Pittsburgh area.

Q What do you mean "out of"?

THE COURT: Well, I think that is colloquial expression in Pennsylvania.

BY MR. GARRETT:

Q Well, perhaps what I mean, are those the exact words he used, do you recollect?

A I can't say.

Q All right. Now, you indicated at the second lineup you circled number eight?

A Yes, sir.

Q Could you explain to the jury why you circled number eight?

A I thought I recognized him, but there was some slight doubt in my mind. I felt like if I was circling five, I was saying definitely that was the same guy, and I just wanted a little time to think about it. I just didn't feel 100% sure at that time.

Q How do you feel today, sir?

A I feel sure. I feel sure.

MR. GARRETT: No further questions.

THE COURT: Anything else, Mr. Lackey?

MR. LACKEY: No recross.

THE COURT: Okay. You may step down.

• • • •

[75] PHILIP RINI,

called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Now, Mr. Rini, would you state your full name for the record, please?

A Philip Rini.

Q And what community do you reside in?

A I reside in New Brighton, Pennsylvania.

Q Do you have a place of business in that vicinty?

A I have a place at 327 Seventh Avenue in Beaver Falls.

Q That is in Pennsylvania?

A Yes.

Q That is a neighboring community to New Brighton?

A That is right across the bridge.

Q Now, in addition to that, do you have another [76] line of employment, sir?

A Yes, sir. I have been the police chief in the Borough of New Brighton for the last 18 years.

Q What is the nature of your business in Beaver Falls?

A I am in the marine business. We sell boats, motors, trailers.

Q Now, were you in business at that location in December of 1978?

A Yes, sir, I was.

Q And did an incident take place at your place of business that has brought you here to court today?

A Yes, sir.

Q Will you tell the ladies and gentlemen of the jury what it was that happened?

A On December 5th, I was on a lunch break from the police department, and I commonly stop in the store for a half hour, 40 minutes before I go back to work. As I walked into my showroom, I noticed my father, who at the time was a partner in the business with me, talking to a black male in the showroom. There was a boat sitting right in the showroom which was about ten steps from the door, and I walked over to my father and said hello to the gentleman that he was talking to. They were discussing a boat, so I entered into the conversation, and the gentleman standing there said he wanted to buy this particular [77] boat that my father had already shown him, but he had worked for the railroad and he would have to go up to the credit union to obtain the money. So I continued to talk to the individual for, oh, probably 20 or 30 minutes while I was there, and then I left and went back to work.

The next encounter I had with the individual was on December 12, and once again I stopped in the store and my father said that Mr. William Jones had called and that he was going to buy this boat and trailer and that he had to obtain the money from the credit union. So I stuck around the store for a while, and he said that he wouldn't be in until later on in the afternoon, so I went back to work. When I returned to the store at approximately 4:30 or 4:45, my father once again said that Mr.

Jones had called him and he had to work over so that he couldn't get in until later on in the evening and he wanted to make sure that we would wait for him. So we went about our normal business, and later on we got another phone call. Well, I answered the phone and the voice on the other end says, "This is William Jones, and I am sorry I am going to be a little late. Will you wait? I am at a rest stop on the Ohio Turnpike."

Q What time was that call, sir?

A I would say it was approximately 7:00 in the evening. So we agreed to wait until the—The weather wasn't the best, so we agreed to wait. In the meantime, I had told my [78] employee, Mr. Diamond, that he would have to stay over because the vehicle that Mr. Jones was bringing in had to be wired and a hitch put on it. So he agreed to say over.

Approximately twenty after seven, or somewhere in that neighborhood, Mr. Diamond, who is my employee, was standing in the showroom window rather anxiously waiting for Mr. Jones because he wanted to go home, and he came to me and said, "There is a truck pulling up front with Ohio plates." So the next thing I know Mr. Jones comes walking in the door, and I was there with my father and Mr. Diamond, and Mr. Jones and myself and my father went into the office, and I said to him, "You might as well bring your vehicle in so that Jim can go ahead and wire it and get the hitch on it and get the boat ready to put on it." This normally takes thirty to forty minutes depending on the difficulty that we have with the wiring. So he agreed. He backed his green Chevrolet pickup in. It was a 1977 or '78. It was a green metallic. It had white spoke wheels on it, a white roll bar in the back, and it was a four-wheel drive vehicle.

So after he backed it in, he came into the office again, and we began to take care of the paperwork for the boat. He presented us with a check, and I began to fill out some of the paperwork that my father hadn't completed

like the temporary transfer. We normally don't complete those until the person arrives and picks up the boat. I asked Mr. Jones if he had any identification so I could take his address and so forth off of [79] it, and he said that he had forgotten his wallet and didn't bring any identification with him. So he handed me the check, and I looked at the check, and, in fact, I looked at it kind of carefully because the amount of the check, instead of being imprinted where it should have been on the line, it was below the line. I began to become suspicious because the check just didn't look right. Well, I thought maybe it could have been a mistake that a girl inadvertenly put it in a checkwriter wrong and misprinted it.

Q Excuse me, Mr. Rini. Let me interrupt you a moment.

May we have this document marked as Government's Exhibit No. 12?

(Whereupon, Government's Exhibit No. 12 was marked for identification.)

BY MR. GARRETT:

Q Now, Mr. Rini, you have referred to a check. Now, was that check given to you?

A Yes, sir.

Q By the person who represented himself as Mr. Jones?

A Yes, sir.

Q Now, I show you a check that has been marked as Government Exhibit 12. Can you identify that check?

A Yes, sir. This is the same check.

[80] Q I think you were telling us about the amount was below the line or something. Could you refer to that?

A Yes, sir. The line for the check amount is here where it says "Dollars," and the amount that is imprinted on the check is below it. In other words, it is off, just off the line by a full line.

Q I think you were saying that you decided it might be a mistake?

A I became suspicious of it when I saw it and particularly after Mr. Jones had said he didn't have any identification. So my father and I and Mr. Jones were in the office, and we walked out into the showroom. I told Mr. Jones that I would have Mr. Diamond instruct him on how to operate the boat, what the proper oil mixtures were for it and so forth. So my father said, "Well, he will need some outboard motor oil," which is a kind of special oil you mix with the gasoline for the outboard.

So as my father and Mr. Jones walked to the showroom, I walked to the back of the showroom area where Mr. Diamond was hooking the boat up, and I obtained the registration of the vehicle. It was an Ohio registration number, and I went to my telephone in the service area and I called my own police department and asked them if they would run a registration check on the vehicle. They called me back—

MR. LACKEY: Your Honor, this would be hearsay. [81] I am going to object.

THE COURT: It could be.

MR. LACKEY: I would also ask that they proceed in a question and answer format. When he gives a running narrative, I do not know what is coming next and I am not able to object to hearsay or other testimony that is coming.

THE COURT: Ask questions back and forth.

MR. GARRETT: Very well, Your Honor.

BY MR. GARRETT:

Q So you contacted your police department; is that right?

A Yes, sir.

Q And they called you back; is that correct?

A Yes.

Q And as a result of that, did you speak to the person who identified himself to you as William Jones?

A Would you restate your question?

Q I am too quick, I guess. As a result of what you learned from your police department, did you then speak to the person who identified himself as William Jones?

A Yes, sir.

Q And what was the nature of that conversation?

A I asked him if he owned the vehicle. He said, no, he had borrowed it from a friend.

Q And at that point, were you satisfied?

[82] A No, sir, I was not satisfied.

Q So what happened next?

A I myself went over to the police department after I left the store. This is after Mr. Jones had left, I had the check in my pocket. I contacted the Youngstown Police Department and asked them if they had any checks from this company stolen and was there such a company. They said that they didn't have any record at the time.

MR. LACKEY: This is also hearsay. I object, Your Honor.

THE COURT: Objection sustained.

BY MR. GARRETT:

Q At any rate, you did some further checking at that time; is that correct?

A Yes.

Q Did you learn anything at that time?

A No, sir.

THE COURT: Let me say to the jury, disregard any hearsay, things that were told to him. By "him," I meant the witness here.

BY MR. GARRETT:

Q Returning back to the point where you had spoken to the person who told you that he was Mr. Jones about

the truck, what happened at that point after he gave you the explanation that it belonged to a friend?

[83] A Well, I talked to him about the truck. I asked him things about four-wheel drive, and it was related that he didn't know too much about the four-wheel drive because it was a friend's vehicle.

Q All right. At some point, did you decide to accept the check?

A Yes, sir, I did.

Q And what happened after you decided to accept the check?

A The following morning—

Q Well, what happened that same night after you decided to accept the check?

A We found that the vehicle registration was not registered to the particular vehicle that it was on. It was, in fact, registered to a Ford.

Q At this point, was Mr. Diamond still working on the trailer hitch?

A Yes, sir, he was.

Q At some point, did he complete that work?

A Yes, sir, he did.

Q Go ahead, please. Tell us what happened at that point.

A Well, as the vehicle was completed, Mr. Diamond went over the boat with Mr. Jones, and I asked Mr. Jones if he could give me a driver's license number, and he said he would [84] call me back the next day with it. He hooked it up to the boat and left our establishment.

MR. GARRETT: Now, may I have this document marked Government's Exhibit 13 and this document marked Government's Exhibit 14.

(Whereupon, Govenment's Exhibits Nos. 13 and 14 were marked for identification.)

BY MR. GARRETT:

Q Now, Mr. Rini, I show you a document entitled "Rini Marine Bill of Sale," which has been marked for

identification as Government Exhibit 13. Can you identify that for the jury?

A Yes, sir. This is our bill of sale for a 19-foot Starcraft Runabout with a 1979 115 horsepower motor and a Trailercraft trailer bearing the serial number on the trailer—It is covered.

Q You can take it out of there. Take that document out of a folder.

A The serial number is 67703, and the engine number being 01025, and the haul number on the boat being STRB66321176-F8. On the bottom where it says, owner's signature, it is signed Mr. William Jones, and for Rini Marine Sales, it is signed Abe Rini, who is my father who is now deceased.

Q Now, does the bill of sale list an amount for the transaction, sir?

A The total amount listed is $6,695.00.

[85] Q Now, this bill of sale which you are referring to, could you hold that up so the ladies and gentlemen of the jury can see it? Now, it has some handwriting on it; is that correct?

A Yes, sir.

Q Who put the handwriting on it that we can see there?

A My father would have put this portion of the handwriting on it.

Q Now, looking at the bottom of it there, I see there is more handwriting on there. Printing is what I am trying to say on that. Who put that printing on there?

A It says, "Tax exempt, out-of-state delivery," which is when a boat is taken from Pennsylvania to another state, we do not collect the sales tax. The sales tax is paid then in the state in which they register the boat.

The other thing that it says here is "Driver's License Number," and it is blank because Mr. Jones didn't have any identification to take a driver's license number off of. Down here where it says, "Trade-in," it says "None" being that there was no trade-in involved.

Q Now, the two signatures, who put those on there?

A Where it says, "Owner's signature," it was signed William Jones, and where it says, "Rini Marine Sales & Service," it was signed by my father.

[86] Q All right. Now, one thing you mentioned was that it was tax exempt because there was an out-of-state delivery. Was there an identification where the boat was to be taken by Mr. Jones?

A The address which he gave us, which is on the bill of sale, is 15419 Hollywood Drive, Warrensville Heights, Ohio.

Q All right. Now, I show you a document entitled "Temporary Registration Plate Certificate" which has been marked for identification as Government Exhibit 14 and ask you if you can identify that, please, sir? You might get a beter look at it if you take it out of the folder.

A Yes. I personally wrote this temporary transfer up. At the top is the applicant information which—

MR. LACKEY: Your Honor, I would ask the government move these exhibits into evidence before he shows them to the jury. I don't believe they had any of their exhibits admitted into evidence.

MR. GARRETT: Your Honor, at this point, the witness is identifying the evidence. Obviously we can't move them into evidence until the witness identifies.

THE COURT: I know, but I think the point is you have been having the witness exhibit these exhibits to the jury and haven't been moving them into evidence. You said, "Show this to the jury."

[87] MR. GARRETT: Yes, sir.

THE COURT: I think his point is well taken technically-speaking.

MR. GARRETT: Very well.

THE COURT: I think he has a right to insist on the technicality.

BY MR. GARRETT:

Q First of all, before you start showing it to the jury, can you identify what that document is?

A Yes. It is a temporary registration transfer card or plate certificate for a temporary plate.

Q All right.

THE COURT: Is that for a boat or a trailer

THE WITNESS: This is for the trailer.

BY MR. GARRETT:

Q Is that related to this transaction?

A Yes, sir.

Q How did you verify that?

A The serial number is on here for the trailer, the make of the trailer and who it is made out to and a temporary plate which was issued for transportation to Ohio.

MR. GARRETT: All right. Now, Your Honor, at this point I would move these exhibits into evidence.

THE COURT: One through 14?

MR. GARRETT: Yes, sir.

[88] THE COURT: Any objection?

MR. LACKEY: We would object to the admission of Exhibit 3 which Mr. Girardi was not able to identify.

MR. GARRETT: I will withdraw that motion to admit Exhibit 3 into evidence. We will have further testimony on it.

THE COURT: You are moving now Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14?

MR. GARRETT: Yes, sir.

THE COURT: We will accept those exhibits and make them part of the record.

MR. GARRETT: Thank you, sir.

(Whereupon, Government's Exhibits Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 were admitted into evidence.)

BY MR. GARRETT:

Q Now, Mr. Rini, would you please indicate how the writing was placed on that document which you have in front of you? You can show this to the jury at this point.

A At the top there is a place for the applicant's name which was William Jones, and then there is a place for the address which is 15419 Hollywood Drive, Warrenville, Ohio with a zip code and a phone number which the state requires.

Q How did you obtain that address, sir?

A I obtained it from Mr. Jones verbally.

[89] Q Please go ahead.

A Under B. is a description of the vehicle that you are issuing the temporary for, which in this case is a Trailercraft boat trailer with the serial number 67703 and the requested gross weight; in other words, the amount of weight that the trailer is permitted to carry, which in this case was 2650 pounds. Under C., it says, "Dealer or Authorized Agent Information for temporary registration plate," and then there is a place here that says, "Card for Temporary Plate" and you x it in and you put the card for temporary plate number in where it is blank, and the second block indicates where the vehicle was to be transported to. In this case the vehicle was to be transported to Ohio.

On down further there is a place here for the issuing dealer to put the name of his business in and the address and also a dealer identification number which every vehicle dealer must have, and it is countersigned by myself, as I filled this out, and it is notarized by my wife who was a notary on the botton. There are three copies to this, which is a green copy must be kept in our file so that if the state comes in they can look through our files and see that the thing was done properly and where the registration plate went. One copy of this goes

to the person purchasing the vehicle to use it as an owners' card. The balance of the copies go to the state.

Q Now, at some point, did you give that temporary [90] registration certificate to the person who identified himself as William Jones for any purpose?

A Yes, I did.

Q What did he do with that?

A He took the temporary registration with the other papers that he got and put them in his pocket.

Q Is there a signature that appears on that document other than your own, of course?

A The signature of Mr. William Jones.

Q How was that placed on there?

A Mr. Jones placed it on himself.

Q In your presence?

A Yes, sir.

Q Now, Mr. Rini, after the person who identified himself to you as William Jones left with the boat, did you have any further contact with him, sir?

A The following day; the following evening by telephone.

Q What happened at that time, sir?

A The telephone rang. I answered the phone, and the person on the other end described himself as being William Jones and said he was calling me back to give me the driver's license number that we needed. Of course, I wasn't too happy at that time and—

Q Why weren't you happy at that time, sir? What [91] was making you unhappy?

A Because I had found out—

MR. LACKEY: Your Honor, it is irrelevant whether he was happy or unhappy.

THE COURT: Well, I think this is in context.

MR. GARRETT: Yes, sir, I believe so.

THE COURT: All right. I will overrule your objection on that.

BY MR. GARRETT:

Q Go ahead, Mr. Rini.

A I found out at 9:00 the following morning that this check had been stolen and that I was out $6,695.00.

Q How did you find that out, sir?

A By calling the place that the check was issued from.

Q And the place being what, sir?

A I don't recall now. I would have to look at the check. L.I.U.N.A. Local 125, Members Savings Account, 319 West Rayen Avenue, Youngstown, Ohio.

Q All right. Now, when you said you got a call from William Jones, and at that point, you were rather unhappy about this turn of events, what was the nature of that conversation?

A I told him that I knew the check was stolen and the phone went dead.

Q Now, how did the phone go dead?

[92] A Evidently, somebody hung up on me.

Q Did you hang up?

A No, sir.

Q Now, did you have occasion to report this matter to the authorities?

A Yes, sir, I did.

Q And did you give a description of the individual who identified himself to you as William Jones?

A Yes, sir, I did.

Q What was that description, to the best of your recollection?

A To the best of my recollection, at the time, he was between 6'2" and 6'4"; between 230, 240 pounds; black male; dark complected, with a gold cap in his front tooth.

Q Do you know whether or not you gave a statement to the FBI regarding this, sir?

A Pardon me?

Q Did you give a statement to a special agent of the FBI regarding this?

A Yes, I did.

Q Now, at some time, did you undertake some steps yourself to attempt to learn the true identity of William Jones?

A Yes, sir, I did.

Q What did you do, Mr. Rini?

[93] A I contacted the Youngstown Police Department Detective Division. I talked with the chief of detectives out there. I related to him what had happened, and he told me that I was welcome—

MR. LACKEY: I object, Your Honor. This is hearsay.

THE COURT: Don't say what the chief out there told you.

MR. GARRETT: At any rate—

THE COURT: The objection is sustained.

BY MR. GARRETT:

Q As a result of your conversation, did you go over to Youngstown?

A Yes, I did.

Q What did you do in Youngstown?

A Went through approximately 2500 photographs.

Q And what was the outcome of that, if anything?

A We did see Mr. Jones in those 2500 photographs.

Q Now, at this point, did you give them any descriptive information regarding who you were looking for?

A Yes, sir, I did.

Q And then you returned to Pennsylvania; is that correct?

A Yes.

Q Subsequently, did anything further come to your [94] attention regarding this matter?

A Yes, sir. I got a phone call from the Youngstown Detective Bureau.

Q And as a result of that, did they send you anything?

A Yes, sir.

MR. LACKEY: It is leading, Your Honor.

THE COURT: Well, restate the question.

BY MR. GARRETT:

Q Well, as a result of that, did you receive anything, any kind of a tangible communication from the Youngstown police?

A Yes, sir, I did.

Q What was that, sir?

A A photograph.

Q What if anything did they tell you about that photograph?

MR. LACKEY: That would be hearsay. I object.

THE COURT: Sustained.

MR. GARRETT: Well, Your Honor, it is not to be introduced for the—I am not asking the question to elicit the information for the truth of whatever he was told but rather to show what may or may not have been in his mind regarding what that photograph consisted of and who it depicted.

THE COURT: I think the only way we can determine [95] that is to have an offer here if you want to make an offer.

MR. GARRETT: Yes, I would be happy to do that.

(Side bar discussion.)

MR. GARRETT: My expectations from the question is that he would say that they were sending him this particular photograph because it somehow or other it corresponded to the information he had given them.

THE COURT: That would get to the truth of it that this is the man that they were looking for. That is what the message is to convey?

MR. GARRETT: Yes, but what I am trying to get at is they didn't give him any information beyond that.

In other words, they were simply sending him a photograph because it somehow or other corresponded to what they told him, not that they were imparting any other information to him. In fact, I am trying to protect the defendant from any implication that they might have given him information of something other than what Mr. Rini had himself communicated to them.

MR. LACKEY: I don't think any information he imparted is relevant. He wants to ask who is in that photograph, was it the defendant, did he identify him as William Jones, or maybe if he told them who that person was, that is okay, but I am afraid we are getting into the MO of the person which is what he testified to in the suppression hearing that he gave the MO and they sent it back and told him, "This is the [96] person."

THE COURT: Why can't you just ask him what was in the envelope and he will say it was a picture.

MR. GARRETT: There was some kind of information from the Youngstown Police Department.

THE COURT: Where is this letter?

MR. GARRETT: No. I think it was a handwritten note. I said it was something like a note that said, "This is the suspect."

THE COURT: That goes to the truth. The identification is the simple part of this case.

MR. LACKEY: Just let him identify the photo.

(The side bar discussion was concluded.)

BY MR. GARRETT:

Q Now, you received, I believe you testified, a photograph from Youngstown; is that correct?

A Yes, sir.

Q A photograph?

A Yes, sir.

Q All right. Now, did you recognize that photograph at all?

A Yes, sir, I did.

Q And who was depicted in that photograph?

A William Jones.

Q This was the individual who had come in?

[97] A Ronald McElroy.

Q How did you know that was the picture of the individual who had come into your business?

A From remembering what he looked like the day that he was in.

Q From looking at the picture; is that correct?

A Yes.

Q Now, after you had obtained that picture and recognized him, what if anything did you do with it?

A I called the resident agent of the FBI, Agent Frezon.

Q And did he respond to your call?

A Yes, sir. He came to my office at the police department.

Q And what did he do?

A He took the photograph from me.

Q Now, at some subsequent time, were you called upon to attend a lineup?

A Yes, sir.

Q And when was that, sir?

A Last Thursday.

Q Now, can you describe how that procedure took place?

A Yes, sir. It was at the No. 1 Police Station, and we were taken into a room.

[98] Q I am sorry, what community was this?

A In Pittsburgh. We were taken into a room that is used for a lineup room. We were seated and spaced far apart so that we couldn't see what each one of us was identifying. The room had a stage in it in effect with a screen over it so that the people that were behind the screen couldn't see the people that were doing the identifying, and they brought in the first batch of six individuals, six black males approximately all the same height and numbered 1 through 6.

We were given a lineup form, and we were told by the person conducting the lineup that if we could identify the suspect in that lineup to circle that number that he had on and to sign our name beside the number itself. The first six suspects that came in, we looked over them. They had them pronounce their name or the name of William Jones. They turned them around so that you could get a good view of them and they told us that if we could not identify anybody in the lineup to circle number eight as there was no number eight. So I looked at the first six people that came in, and I circled number eight because I didn't see Mr. Jones.

They then photographed the lineup. Then they brought in six more individuals, black males once again all approximately the same height. As they were coming through the door into the lineup room, number five was Mr. Jones. I saw him before they even put him in front of us, but we still had [99] to go through the procedure. So I circled number five, put my name beside it, and we weren't told whether it was the right subject or not. Then they photographed the lineup again, and then they were released.

Q After the lineup was concluded, were you questioned by anybody?

A Yes. I was questioned by Agent Bridges.

MR. LACKEY: Your Honor, this is irrelevant to the identification of the lineup.

THE COURT: Well, I will overrule you on that. He hasn't asked what they said or the questions they put to him.

BY MR. GARRETT:

Q Were you questioned by anybody else as well?

A Say that again.

Q I am sorry. Were you questioned by anyone else other than Agent Bridges from the FBI?

A No; not that I can recall.

Q Now, I show you some photographs, Government Exhibits 7, 8, 9, 10 and 11 and ask you if you can identify those, sir?

A Yes, sir. This is a photograph of what I can recall seeing at the lineup.

THE COURT: Just a moment. Is that the first or second one?

THE WITNESS: This is the second lineup, Your [100] Honor.

BY MR. GARRETT:

Q Now, you previously testified that you recognized the number five man; is that right?

A Yes, sir.

Q How did you come to describe him as the number five man?

A When they first came in the door, I saw right away that it was him. I knew right away as soon as I see him.

Q Perhaps I am not expressing myself. In other words, how did you get the numeral designations?

A All the suspects were numbered from 1 through 6.

Q You were instructed to pick out whichever one you recognized and refer to him by the number; is that right?

A Yes, sir.

MR. GARRETT: Those photographs that have already been admitted into evidence, I would request they be circulated among the jury at this time.

THE COURT: Any objection?

MR. LACKEY: No.

THE COURT: All right. You may circulate the pictures among the jurors.

(The photographs were shown to the jury.)

BY MR. GARRETT:

Q Now, Mr. Rini, on the first occasion on December [101] 5 when you spoke to the man who came into your store, how long were you speaking with him on that day?

A Twenty or 30 minutes.

Q And what time of day was that, sir?

A This is around lunch time between 12 and 1:00.

Q In your showroom?

A Yes, sir.

Q Now, when the man who called himself William Jones came back on the 12th, did you recognize him at that time?

A Yes, sir.

Q And how long did you have to speak together with him on that occasion?

A Approximately 40 minutes or longer.

Q And what time of day was that when he came back?

A Sometime after 7:00 in the evening.

Q And you were in your showroom again?

A In the showroom and in the shop which is both well lighted.

Q Now, sir, is the man who identified himself as William Jones present in this courtroom here?

A Yes, sir, he is.

Q And can you point him out for the ladies and gentlemen of the jury?

A Yes, sir.

Q Would you describe what he is wearing?

[102] A A striped shirt.

MR. GARRETT: For the record, the witness is identifying the defendant.

BY MR. GARRETT:

Q Mr. Rini, is there any doubt in your mind about that identification?

A No, sir, there is not.

Q Now, I think you had testified earlier, Mr. Rini, about a particular characteristic of the teeth of the individual?

A Yes, sir. He has approximately maybe two, but I saw at least one gold cap on the front tooth.

MR. GARRETT: Could the defendant be directed to display his teeth to the jury at this time, Your Honor?

THE COURT: Do you have any objection, Mr. Lackey?

MR. GARRETT: You are talking about front teeth?

THE WITNESS: Yes, sir.

MR. LACKEY: We have no objection.

THE COURT: You can stand up and exhibit your teeth if you will, please.

Ladies and gentlemen of the jury, are you able to see the teeth?

MR. GARRETT: No further questions, Your Honor. Thank you.

[103] THE COURT: Cross examine

CROSS EXAMINATION

BY MR. LACKEY:

Q Mr. Rini, have you since discovered the whereabouts of this boat you sold Mr. Jones?

MR. GARRETT: Objection.

THE COURT: On what grounds?

MR. GARRETT: Relevancy, Your Honor.

THE COURT: I think he is maybe trying to test the credibility of this witness. Is that what you are doing?

MR. LACKEY: That is one reason, Your Honor.

MR. GARRETT: Well, perhaps we can have an offer of proof maybe.

THE COURT: You don't have to offer anything. You may proceed. He's entitled to test the credibility of this witness within limits.

BY MR. LACKEY:

Q Have you since discovered the whereabouts of that boat?

A Yes, sir, I have.

Q And who is in possession of that boat?
A A William Yates.
Q And where does he live?
A In Beaver, Pennsylvania.
[104] MR. LACKEY: No further questions.
THE COURT: Any redirect?
MR. GARRETT: One moment, Your Honor. If you will just indulge me for a moment.

REDIRECT EXAMINATION

BY MR. GARRETT:

Q Mr. Rini, how did you happen to find the boat, or how did it happen to come to your attention that this individual by the name of Yates had the boat?
A I was on the river about a month ago, and I saw this boat and motor and trailer pull in.
Q At that time?
A Pardon me?
Q At that time?
A Yes.
Q A month ago?
A Yes.
Q And it was in the possession of Mr. Yates at that time?
A Yes, sir.
Q Have you recovered possession of that boat at this time, sir?
A No, sir.
MR. GARRETT: No further questions.
THE COURT: Any recross?

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[135] MARTIN M. MASON,

called as a witness, having been duly sworn, testified as follows:

[136] MR. LACKEY: Could we have an offer of proof as to Mr. Mason?

MR. GARRETT: Yes, sir. May we approach side bar, Your Honor?

(Side bar discussion.)

MR. GARRETT: Your Honor, Mr. Mason is the Secretary/Treasurer of Local 125 of the Laborers International Union of North America located in Youngstown. He will testify that the checks which were presented at Rini and Don Allen Chevrolet were stolen. He will also testify tbout who the authorized signatures are on the check, and he will testify to the fashion in which the checks would normally be made out legitimately. He will testify that the signature that appears on the check is not the signature of an authorized maker. He is, of course, familiar with all of these matters pertaining to the checks.

MR. LACKEY: No objection.

THE COURT: No objection.

MR. GARRETT: Thank you, Your Honor.

Would you just indulge me for one moment while I get myself straightened out?

THE COURT: Take your time and get yourself straightened out.

MR. GARRETT: Yes, sir.

DIRECT EXAMINATION

[137] BY MR. GARRETT:

Q Mr. Mason, would you please state your name for the record, sir?

A Martin M. Mason.

Q And where do you live, sir? What community?

A Youngstown, Ohio.

Q Are you employed at any particular location, sir?

A Yes.

Q What organization are you employed by?

A Laborers International Union of North America, Local 125.

Q Is that located in Younsgtown?

A In Youngstown at 319 West Rayen Avenue.

Q Do you have any position at the local?

A I am the Secretary and Treasurer.

Q Now, sir, are you familiar with an account that was maintained at the Dollar Savings & Trust Company which was called the Members Savings Account?

A Yes.

Q Now, sir, I show you two checks which have been previously marked for identification as Government's Exhibit 2 and Government's Exhibit 12. I ask you if you can please identify those checks, sir?

A Yes. They are checks of our account.

[138] Q When you say "checks of our account," what do you mean?

A Of the membership savings.

Q Those were checks which were issued to your local on that account?

A By the Dollar Savings & Trust Company.

Q All right. Now, at some point, do you remember whether or not there was a burglary at the union hall?

A Yes.

Q Do you remember when that was, sir?

A That was in the latter part of March or early April.

Q Of what year, sir?

A Of 1977.

Q What was taken, if anything, in the course of that burglary?

A A typewriter and calculator, desk, stamp meter, two checkbooks and—

Q And what checks were contained in those books?

A The membership savings check was on both.

Q You are referring to those same checks?

A These checks.

Q All right. Now, do you see those checks in front of you there, sir?

A Yes.

[139] Q Is it those checks that were stolen, sir?

A They were. A lot of the ones were just reordered.

THE COURT: Sir, you didn't answer the question. He wanted to know whether these checks were stolen or not.

THE WITNESS: Yes.

THE COURT: You are referring to Exhibits what and what?

MR. GARRETT: Government Exhibit 2 and Government Exhibit 12.

THE COURT: Those were stolen checks?

THE WITNESS: Yes.

BY MR. GARRETT:

Q Now, I direct your attention to the signature that appears at the bottom left of the two checks. Do you see the signature there?

A Yes.

Q Can you read that signature to the jury?

A James Southlander.

Q Do you recognize that signature, sir?

A No, I don't.

Q Can you tell the ladies and gentlemen of the jury who the persons were who were authorized to sign that account?

A The president and a trustee, James E. Southerland, S-o-u-t-h-e-r-l-a-n-d, and Martin M. Mason, M-a-s-o-n, and [140] Andrew E. Jackson.

Q Now, you mentioned Martin Mason. That is yourself?

A Yes.

Q And the other two gentlemen are also connected to the local?

A Yes.

Q Are you familiar with their signatures, sir?

A Yes.

Q Now, you said that one of the persons who was authorized to sign was a James Southerland. Is that the signature of James Southerland?

A No, it is not.

MR. GARRETT: Your Honor, would you just excuse me for a moment. I want to get one exhibit.

THE COURT: You go right ahead.

MR. GARRETT: Thank you. May I please have this marked as Government Exhibit 15?

(Whereupon, Government Exhibit No. 15 was marked for identification.)

THE COURT: Any objection?

MR. LACKEY: Is he moving it into evidence?

MR. GARRETT: I will. I just want to have Mr. Mason look at it.

MR. LACKEY: I have seen it.

[141] THE COURT: Do you have any objection to this exhibit?

MR. LACKEY: None.

BY MR. GARRETT:

Q Now, Mr. Mason, I show you what appears to be a signature card of the Dollar Savings & Trust Company, Youngstown, Ohio, which has been marked for identification as Government Exhibit 15 and ask you if you can identify that, please, sir?

A Yes, I can.

Q Would you tell the ladies and gentlemen of the jury what that is?

A This is a Dollar Savings & Trust authorization resolution for signatures on an account for Local 125.

Q Now, which account is that for?

A It is for the Members Savings Account 010-130-060 which appears on the check.

Q That is the same as on Exhibit 2 and Exhibit 12?

A Yes.

Q Does it have the authorized signatures on it?
A It does.
Q And could you just read the signatures, please?
A A. E. Jackson, James E. Sutherland, Martin M. Mason.
MR. GARRETT: Your Honor, I would move that [142] exhibit into evidence at this time.
MR. LACKEY: We have no objection.
THE COURT: The exhibit is admitted and made part of the record.

(Whereupon, Government Exhibit No. 15 was admitted into evidence.)

BY MR. GARRETT:

Q And would you please, Mr. Mason, pick up that card, if you would, sir, and hold it up and point to the signatures so the members of the jury can see it.
A Read it?
Q Yes, that would be fine, if you would.
A A. E. Jackson on the top line, James E Southerland on the second line, and at the far right-hand side, Martin M. Mason, with the phone number 743-3214.
Q Now, you testified that the checks had been stolen. Now, sometime after that, did you communicate that to the bank?
A Yes.
Q What was the status of the account after that?
A It was closed.
Q Do you remember when it was closed?
A Somewhere between the 7th and the 12th of April.
Q Of?
A 1977.
[143] Q Could you tell the members of the jury what the account was used for, Mr. Mason?
A Our members have a dollar an hour deducted from their pay to send to the Dollar Savings & Trust Company for an individual savings account, so between the 1st and

the 5th of December each member received an individual check. Sometimes the members did not get their money then, so in 1970 we opened this account so the members could get their money in the month of December when the employers were late sending it. They would send it to us, and we would deposit it into the bank. That is when we opened this account, and the check for each individual man was reported by the employer.

Q So the checks would be written to the individual member?

A The individual member that the employer contributed on.

Q Were the checks ever written to businesses?

A No. There was no authorization to do it. I couldn't do it, because that was the membership's money.

Q Now, when the checks were properly issued on that account, how was the amount written on there?

A It was typed. The name was typed in, and we have a checkwriter—It is old; from 1937. The check is imprinted with Laborers International Union of North America all abbreviated in the left-hand corner.

[144] Q Would it appear on the checks?

A It would appear over here just opposite the amount and dollar sign. As a matter of fact, if we had about four digits with a dollar sign, it would move over here. It was imprinted very faintly.

Q That was printed automatically by the checkwriter every time?

A Right along with the amount. It would go right in. It was on a slot, a plate rather.

Q Now, sir, are you familiar with the members of the union?

A I would say visually, yes.

Q I direct your attention to the defendant sitting in the courtroom. Is he in any way associated with your union?

A No.

Q Now, do you know whether or not there is a member of the union named Charles Ronald McElroy?

THE COURT: Just a moment. Do you know who the defendant is in the courtroom here?

THE WITNESS: I think that would be the young man sitting next to the attorney.

THE COURT: Would you stand up, please. This gentleman is the defendant. Let the record show the defendant has stood up. Now, would you ask him the question?

BY MR. GARRETT:

[145] Q Now, the gentleman who just rose in this courtroom, do you know whether or not he is associated in any way with the Laborers International Union, Local 125?

A Not of Local 125.

Q Now, are you familiar with the names of the members of that local?

A I am. That is my responsibility mostly.

Q Have you ever heard of the name Charles Ronald McElroy in connection with that union?

A Not to my knowledge. I have been there 26 years.

Q Have you ever heard the name Ronny Cook, III connected with that?

A No.

Q Have you ever heard the name William Jones of Warrenville Heights, Ohio, connected with that?

A I have a William L. Jones, but it is not him.

Q You have a William L. Jones?

A Yes, and I had a William E. Jones.

Q But it is not this gentleman?

A No.

MR. GARRETT: No further questions, Your Honor.

THE COURT: Cross examination.

MR. LACKEY: We have no cross examination.

* * * *

[151] (Whereupon, the jury retired.)

(Whereupon, the following proceedings were held out of the hearing of the jury.)

THE COURT: On the record. We were discussing the matter of law in regard to Mr. Schneider, and the Court would like to point out there is literally a multitude of cases which indicate that if a person cashes a forge document in one state where the check was drawn on a bank in another state that that is circumstantial evidence that the check was moved in interstate commerce.

There are many cases on that in a note to 18 USC Code 2314, Note 164. If you look at those cases, there are many cases where the court could charge that a person who cashes a check that was drawn in State A or came from State A, because it was obviously a check that was in State A, but then there is an attempt by a person to cash it in State B, that that's competent evidence to show that the check did move through interstate commerce. A lot of cases hold that.

MR. GARRETT: But I think all those cases turn on a fact that we don't have in this case; namely, that the checks were collected in normal banking channels. These checks were not.

THE COURT: No, I don't think so. These cases were presented to a merchant. In other words, here is a case, for example, where it is held that a defendant who negotiated an out-of-state forged check caused securities to be transported [152] in violation of the section, although the defendant was not responsible for the actual interstate transportation. Once this check was presented, assuming it was negotiated—You can't negotiate checks other than through banks.

MR. GARRETT: Well, if Your Honor pleases, I believe that those cases would indicate that the reason that there was interstate commerce there was that after

those checks were negotiated, there was an attempt to collect payment from the drawee bank. Here there was no attempt to collect payment from the drawee bank.

THE COURT: I think the fact they attempted to use the check is sufficient. Why don't both sides give me a brief on this tomorrow. Read a lot of cases. We are under 18 USC 2314. How about bringing in a trial memorandum and see whether I am correct on that.

MR. GARRETT: Well, I know the law to be that the government has to show that there was an interstate connection.

THE COURT: I understand.

MR. GARRETT: Now, if I steal Mr. Lackey's checks—

THE COURT: I don't want to argue with you. What I want you to do is read all of these cases in here and tell me if any of these cases are material here in regard to this matter. Whether or not the mere fact that this man—assuming the jury would believe it and assuming he is probably [153] identified—if he attempted to negotiate a check here in this state that obviously originated in a sister state, is that in and of itself sufficient evidence to sustain a conviction.

Now, do research between now and tomorrow morning and bring me a little brief indicating what you find on that point. All right. That is what I think you ought to do.

MR. GARRETT: Well, I will certainly bring to the Court's attention whatever cases I can find that would sustain that.

THE COURT: That is right. I think a good start would be under the note 164.

MR. GARRETT: Your Honor, I can state in complete confidence that those cases turn upon the fact that there was an attempt made to collect—

THE COURT: Read these cases and see if that is not true.

MR. GARRETT: Well, I have read them, Your Honor.

THE COURT: Look at them. Maybe there is a case you didn't see before. I want you to read all these cases and tell me if there is anything there that sustains that proposition.

MR. GARRETT: Your Honor, the government's theory is the defendant is guilty under the statute because he [154] brought the checks from Ohio into the Commonwealth of Pennsylvania.

THE COURT: Well, that is all right. There is nothing wrong with that theory.

MR. GARRETT: But the additional evidence of whether they were carried in interstate commerce—

THE COURT: That is the question.

MR. LACKEY: I believe the indictment would limit the government to prove they travelled from Ohio to Pennsylvania, because that is how Counts 1 and 3 are charged.

THE COURT: Well, sure, but the fact that he had a check that was forged in Ohio in his possession in Pennsylvania, is that an inference that he brought it across the state line? The government would be limited, in my mind, but, Mr. Garrett, you check into it and see what you find. Of course, if both of you believe I shouldn't charge that way, then I won't.

MR. GARRETT: I have researched this extensively, and I think it would be error for Your Honor to charge that the defendant could be convicted on any other grounds other than he brought the checks with him from Ohio to Pennsylvania.

THE COURT: That is not the question whether he brought the checks or not. The question is whether the check originated in Ohio and he attempted to negotiate it in Pennsylvania. The circumstantial evidence is that he brought the checks across the line. That is the issue. Do you follow [155] me?

Now, we have testimony to the effect that he was in possession of the checks, that they were forged and they had originatd in Ohio. Now, is that proof that he, in fact, did bring them across the line? Is that the circumstantial evidence? That is the question.

MR. GARRETT: Yes, sir.

THE COURT: I think you ought to look into it, and both sides ought to. I don't want to charge improperly, and I think help from both attorneys would be very good under the circumstances on this point. I am not saying that I know the answers; I am merely asking for help from the attorneys which most judges try to get help from.

MR. GARRETT: Yes, sir. Thank you.

THE COURT: Anything else?

MR. LACKEY: No, Your Honor.

MR. GARRETT: No, Your Honor.

THE COURT: All right. Now, we will adjourn.

(Whereupon, at 4:45 p.m. the proceedings were adjourned.)

• • • •

[6A] MR. GARRETT: Your Honor, at this time the Government would recall Al Girardi. He has already been sworn.

ALBERT G. GIRARDI

recalled as a witness on behalf of the Plaintiff, resumed the stand and was further examined and testified as follows:

FURTHER DIRECT EXAMINATION

[7A] BY MR. GARRETT:

Q Mr. Girardi, I recalled you just to ask you a few brief questions, sir.

In reference to your testimony yesterday, you remember that you identified a check, Government's Exhibit 2; is that correct?

A Right. That's correct.

Q And you also identified a retail order for a motor vehicle, Government Exhibit 3.

A Right.

Q Now, what is the amount of the check, sir?

A What is the amount?

Q Yes, sir.

A $6,706.

Q Now, how did it happen that that particular math was set on that or figured on that check, to the best of your knowledge?

A Well, initially we had figured this same deal here out to include Pennsylvania sales tax.

Q All right. When you say "initially", what time do you mean, what point of time?

A Well, the first order that was written had Pennsylvania sales tax included.

Q And when was that written?

A That was written on the 16th.

[8A] Q So that amount was including the sales tax, was the amount that the man who identified himself to you as William Jones was told; is that correct?

A Right.

Q Now, the amount on the retail order, the actual retail order that was used on this sale, what is the amount of that, sir?

A $6,328.

Q Now, what is the reason for the lesser amount on the final sales order?

A The lesser amount, when Mr. Jones come in, he indicated he was going to go ahead and title the car in Ohio, which meant I did not have to charge Pennsylvania sales tax.

Q All right. And as a result of that, there was a lesser amount for the final price?

A There was a lesser amount, right.

Q Now, nevertheless, you did accept the check in the amount of $6,700; is that correct?

A I did.

Q And what arrangement was made, if any, for the overpayment that was represented by that purported check?

A I told him once the check cleared that we would send a refund check to his listed address.

Q Now, did you take some further steps regarding certifying that check, that particular check, later on? [9A] A Yes, the next morning after I delivered the car, I called direct out there to the Dollar Bank in Youngstown.

Q And what, if anything, did you find out?

MR. LACKEY: I object, Your Honor. This is beyond the offer of proof.

THE COURT: It is beyond the offer of proof.

MR. GARRETT: Your Honor, most respectfully, I think I did mention that in the offer of proof. I am quite certain I did, in fact.

THE COURT: All right. Well, let's go to the side bar and we will have the young lady read the offer back to you.

MR. GARRETT: Very well.

THE COURT: Make sure we have the correct judgment on it.

(Whereupon, at side bar the reporter read the offer of proof by Mr. Garrett from the record.)

THE COURT: You may continue, yes.

MR. GARRETT: You may answer the question, Mr. Girardi.

A I found out that the account had been closed for reasons that there were a number of checks stolen and I was told at that point not to take the check which, of course, I had already accepted.

Q All right. As a result of that, do you know [10A] whether Don Allen ever deposited the check?

A I don't believe they did.

Q Do you know whether or not Don Allen ever received any payment for that check?

A I believe they didn't.

Q Any payment for that car is what I mean.

A No.

Q Do you know whether Don Allen ever recovered that car?

A No, they didn't.

Q And, by the way, what is the description of the car that was sold?

A It was a, orange in color, '74 Corvette.

Q And is the vehicle identification number indicated on the retail order there?

A Yes, it is.

Q And what is the vehicle identification number?

A You want me to read the whole number?

Q Well, if you would.

A Yes. 1Z37J45421650.

MR. GARRETT: All right. Thank you. No further questions.

THE COURT: Any cross?

MR. LACKEY: Yes, Your Honor.

FURTHER CROSS EXAMINATION

[11A] BY MR. LACKEY:

Q You mentioned on direct that the refund check would be sent to the listed address?

A Yes, sir.

Q Isn't it true that the agreement actually was that Mr. Jones would return the next day for his change of $306?

A I am sure I wouldn't cut a refund check until the check had cleared. He was supposed to return the next day for the title work to the car.

Q Do you remember making a statement on December 4th, 1978, excuse me, on November 2nd, 1978, to Special Agent William Noon of the FBI, in which you told him that Mr. Jones would come back the following day for title to the automobile and his change of $306?

A It is possible I made that statement, but I couldn't see any way that I could cut a refund check until the check had cleared.

MR. LACKEY: No further questions.

• • • •

[15A] DIRECT EXAMINATION

BY MR. GARRETT:

Q Mr. Johnson, would you please state your name for the record?

A Gordon L. Johnson.

Q And what is your occupation, sir?

A I am a special agent with the FBI, located in Youngstown, Ohio.

Q Now, have you ever had any contact with the Defendant in this case?

A Yes.

Q Would you point him out for the record, please?

A The fellow sitting there at the table.

Q What is he wearing today?

A A striped shirt.

MR. GARRETT: For the record, identifying the Defendant, Charles Ronald McElroy.

Q When did you have some contact with Mr. McElroy, sir?

A I believe it was March 30 of this year, 1979.

Q And what was the purpose of your meeting with him at that time?

A I was entering—I met with him to interview him in Youngstown, Ohio.

[16A] Q Interviewed him about what, sir?

A About possibility of checks from Pittsburgh area.

Q You mean the checks involved in this matter?

A Yes, being used to purchase a boat and a vehicle.

Q Would you please relate for the members of the jury what the nature of the interview was with him?

A I asked him, clarified his identity. At that time he was going under the name of Ronnie Cook. He advised me that that was his name as well as the name of Charles Ronald McElroy. He said they were both his legal names and he had birth certificates in both names.

He advised me that he neither ever owned a boat and does not own a vehicle at that time. He advised he had no knowledge of the checks.

He further advised me that he was in October, November and December of 1978, he was residing in East Liverpool, Ohio, and was employed by his brother, Willie Cook, as a painter, in East Liverpool.

Q Now, specifically, did you ask the Defendant whether he had any knowledge of the names William Jones and James Southland?

A Yes, I did, and he said the names were not familiar to him and denied having ever used those names.

Q And prior to asking him any questions, sir, did you advise the Defendant of any rights?

[17A] A Yes, I did, and I provided him with advice of rights forms which we use, and he signed it, indicating that he did understand his rights.

Q And in addition to understanding his rights, did he indicate whether or not he wanted to exercise them?

A He advised he was willing to be interviewed at that time.

Q Now, one further question, sir. You mentioned the town of East Liverpool, Ohio.

A Yes.

Q Where is that in relation to Youngstown?

A That's, I would guess, about 35 miles south of Youngstown, near the West Virginia-Ohio-Pennsylvania border.

MR. GARRETT: Thank you. No further questions.

THE COURT: Cross examination.

MR. LACKEY: Yes, Your Honor.

CROSS EXAMINATION

BY MR. LACKEY:

Q You state that Mr. McElroy advised you that he would have been working for his brother in October through December, 1978?

A Yes. I asked him his employment and he said as a painter for his brother.

Q And isn't it true that his brother's principal job was with a Crucible mill in Midland, Pennsylvania?

[18A] A That is what he told me, yes.

MR. LACKEY: No further questions.

MR. GARRETT: No redirect, Your Honor.

THE COURT: You may step down.

(Witness excused.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Criminal No. 79-32

UNITED STATES OF AMERICA

v.

CHARLES RONALD MCELROY

DEFENDANT'S POINTS FOR CHARGE

1. Before you can convict on either Count 1 or Count 3, you must conclude beyond a reasonable doubt that the check which is the subject of each count traveled from Youngstown, Ohio to Pittsburgh in its forged or altered state.

United States v. *Owens*, 460 F.2d 467 (5th Cir. 1972)

2. In the absence of evidence to the contrary, there is a presumption that the forgery in this case was committed where the checks were first found in an altered state.

United States v. *Lee*, 485 F.2d 41 (4th Cir. 1973)

United States v. *Owens*, 460 F.2d 467 (5th Cir. 1972)

3. There is no direct evidence in this case that the checks which are the subject of Counts 1 and 3 were not forged where they were first found in an altered state—that is, Pittsburgh and Beaver Falls respectively.

4. There is no direct evidence that the Chevrolet Corvette which is the subject of Count 2 was ever taken from Pennsylvania into Ohio.

Respectfully submitted,

/s/ Robert L. Lackey
ROBERT L. LACKEY
Assistant Federal Public Defender

CERTIFICATE OF SERVICE (omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Criminal No. 79-32

UNITED STATES OF AMERICA

v.

CHARLES RONALD MCELROY

GOVERNMENT'S REQUESTED POINTS FOR CHARGE

1. A check is a security within the meaning of Title 18, United States Code, Section 2314. Furthermore, a spuriously and fictitiously made check is a falsely made, forged, altered or counterfeited security within the meaning of the statute. The government need not prove any particular reason for the document's lack of authenticity, for the purpose of the statute is to prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method of causing the lack of authenticity. Title 18, United States Code, Section 2311. *United States* v. *Williams*, 498 F.2d 547 (10th Cir. 1974). *United States* v. *Huntley*, 535 F.2d 1400 (5th Cir. 1976).

2. The meaning of securities under Title 18, United States Code, Section 2314 is not limited to documents which are valuable in themselves, but applies to documents which may be used as fraudulent representations of some valuable property right. It is the right or interest apparently represented which has value rather than the document itself. Therefore, a spuriously and fictitiously made check, which has no actual value, is a security within the meaning of the law. *United States* v. *Speidel*, 562 F.2d 1129, 1131 (8th Cir. 1977).

3. The government must show that the checks were transported in interstate commerce in a forged condition.

However, transportation within the destination state, here Pennsylvania, may be considered transportation in interstate commerce if it is a continuation of the movement that began out of state. *United States* v. *Tobin*, 576 F.2d 687, 692-693 (5th Cir. 1978).

4. The government need not exclude every speculative possibility that the transportation may have been interrupted at some point. Nor need the government show each step in the securities' movement in interstate commerce. Such a requirement would impose an almost impossible burden on the government. *United States* v. *Tobin, supra.*

5. If you believe that the government has shown that defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part of interstate commerce. *United States* v. *Tobin, supra.*

6. The government must prove that defendant transported the checks involved in Counts One and Three of the indictment in interstate commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which he started. *Gay* v. *United States*, 408 F.2d 923, 928-929 (8th Cir. 1969). *United States* v. *DiLella*, 354 F.2d 584 (7th Cir. 1965). *United States* v. *Tobin*, 576 F.2d 687 (5th Cir. 1978).

Respectfully submitted,

ROBERT J. CINDRICH
United States Attorney

By: /s/ James Y. Garrett
JAMES Y. GARRETT
Assistant U.S. Attorney

CERTIFICATE OF SERVICE (omitted in printing)

[90-A] AUGUST 9 1979

9:15 O'CLOCK A.M.

(Whereupon, at 9:45 o'clock a.m., the following proceedings were held in open court.)

THE COURT: Mr. Garrett.

MR. GARRETT: Your Honor, at this time the Government has handed up to the Court some requested points for charge in this case, and I state for the record that I have supplied a copy to Mr. Lackey, defense counsel.

THE COURT: Very good. The Court will read the requested points for the record and rule on each point as submitted.

The first point submitted by the Government is this: One. A check is a security within the meaning of Title 18, United States Code, Section 2314. Furthermore, a spuriously and fictitiously made check is a falsely made, forged, altered or counterfeited security within the meaning of the statute. The Government need not prove any particular reason for the document's lack of authenticity, for the purpose of the statute is to prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method of causing the lack of authenticity.

[91-A] And the Court will approve that request.

Do you have any comment on that, Mr. Lackey?

MR. LACKEY: We have no objection to the first point.

THE COURT: All right. Two. The second request of the Government is: The meaning of securities under Title 18, United States Code, Section 2314 is not limited to documents which are valuable in themselves, but applies to documents which may be used as fraudulent representations of some valuable property right. It is

the right or interest apparently represented which has value rather than the document itself. Therefore, a spuriously and fictitiously made check, which has no actual value, is a security within the meaning of the law.

The Court will approve that.

Do you have any comment, Mr. Lackey?

MR. LACKEY: We have no objection to that, Your Honor.

THE COURT: All right. Three. The Government must show that the checks were transported in interstate commerce in a forged condition. However, transportation within the destination state, here Pennsylvania, may be considered transportation in interstate commerce if it is a continuation of the movement that began out of state.

Any comment?

[92-A] MR. LACKEY: On that one, we would except on the ground that we continue to contend that the Government in this case must show that the check was forged in Ohio for it to be considered to have moved in interstate commerce.

THE COURT: All right. The Court will overrule your objection and we will sustain the Government's position as to suggested Point 3.

Four. The Government need not exclude every speculative possibility that the transportation may have been interrupted at some point. Nor need the Government show each step in the securities' movement in interstate commerce. Such a requirement would impose an almost impossible burden on the Government.

In this instance, the Court will approve the following language but will not approve the last sentence. The Court will approve the following language: The Government need not exclude every speculative possibility that the transportation may have been interrupted at some point. Nor need the Government show each step in the securities' movement in interstate commerce.

As to that one, Mr. Lackey?

MR. LACKEY: As the Court has corrected the point, we have no objection to it.

THE COURT: All right. Five. If you believe that the Government has shown that Defendant transported the [93-A] checks while they were in a forged condition within the State of Pennsylvania, the requirements of of the law are satisfied if that transportation was part of interstate commerce.

Mr. Lackey?

MR. LACKEY: We would except to No. 5 on the ground I urged earlier as in No. 3.

THE COURT: The Government position will be sustained and the Court will overrule Mr. Lackey's objection for the Defendant.

All right. Six. The Government must prove that Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate Commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which he started.

Do you object to that?

MR. LACKEY: No objection.

THE COURT: All right. The Court will approve Point 6 as stated.

Now, I would like to have permission from both of you to consider, in order for clarity, to consider in my charge 1 and 3 together rather than the charge on 1, then charge on Count 2, then on Count 3, since 1 and 3 deal with checks and also the requests will deal with both counts.

Is that agreeable with you gentlemen?

MR. LACKEY: That's agreeable to the Defendant.

* * * *

[155-A] Now, just for the sake of your thinking, in order [156-A] to keep these three offenses separate in your minds, I am going to speak of them as follows: You first have the check incident that was alleged, that was in Count 1, which had to do with Don Allen Chevrolet Company, so the first incident, the first thing, in order

to remember which count is which, No. 1 had to do with Don Allen Chevrolet, and it had to do with the transportation of a certain check from Youngstown, Ohio, or Ohio into Pennsylvania, and this check was paid or made payable to Don Allen Chevrolet.

Now, I am going to give you more specifics, but I want you to be able to categorize each one of these counts for your thinking.

All right. The first count had to do with Don Allen Chevrolet and had to do with the passing of an alleged bad check. The second count has to do with the transportation of a Chevrolet Corvette from Pennslyvania, the evidence indicated, although your recollection counts, allegedly from Pittsburgh into Ohio. Now, that's the second count. The second count has to do with the removal of a car from Pennsylvania to Ohio. That's the second count.

Now, the third count has to do with the check transaction that occurred in regard to Rini Marine Sales, so you can keep these in your mind. The first has to do with the check at Don Allen's Chevrolet; the second one had to do with the transporting of the Corvette from Western Pennsylvania [157-A] into Ohio; and the third matter had to do with a check, alleged bad check, that was presented to the Rini Marine Sales. So now you have a general idea about how to keep each one of these counts or charges apart.

Now, these are three distinct, separate allegations of crime. I am sure you understand. Now, you have those in your mind. Now I am going to talk about those things specifically, now so that you can understand how to apply the law to the facts of this case. Now I will tell you what else I am going to do in order to make it easy for you to understand and easy for you to remember. I am going to discuss the two check cases together and then I am going to discuss the allegation that the Defendant transported a stolen car from Western Pennsylvania to Ohio last.

So we will discuss the two check cases together because the same law basically applies to the two check cases. I wanted you to have this in your mind so this will be clear and you will not be confused.

All right. Now, the first charge, I am going to read it, is that—now, this has to do with Don Allen Chevrolet, the first charge, that beginning on or about October 16, 1978, in Youngstown, Ohio, and contining thereafter in the Western District of Pennsylvania, Charles Ronald McElroy, also known as William Jones, did, with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce [158-A] from Youngstown, Ohio, to the Western District of Pennsylvania, a certain falsely made and forged security, to wit, Check No. 2441, drawn on the Dollar Savings and Trust Company, Youngstown, Ohio, upon the account of L.I.U.N.A. Local 125, members savings account, 319 West Rayen, R-a-y-e-n, Avenue, Youngstown, Ohio, 44502, payable in the amount of $6,706, dated October 17, 1978, made payable to Don Allen Chevrolet Company, and signed by James Southland, and the Defendant Charles Ronald McElroy, also known as William Jones, then well knew the same to have been falsely made and forged.

Now, the applicable statute as pertains to Count 1 is whoever, with unlawful and fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited, they commit a crime if they do that against the United States.

Now, each one of these elements must be proved, and I am going to specifically enumerate them, each element has to be proved to your satisfaction through the evidence as you have heard here in the courtroom beyond a reasonable doubt.

Now, the element that has to be proved in this first count, the Don Allen Chevrolet, it has to be proved to

your satisfaction based on the evidence presented in the courtroom here, beyond a reasonable doubt, these are as follows:

[159-A] One. That you have to find beyond a reasonable doubt that this man, this Defendant, had the unlawful and fraudulent intent, he had an unlawful and fraudulent intent.

Secondly, that he did—and that he did these acts charged with an unlawful and fraudulent intent.

Thirdly, that this Defendant transported and caused to be transported in interstate commerce from Ohio—how am I going to say this to you—there is no necessity for the Government to prove that this particular check came from Youngstown. The Government merely has to show that it came from Ohio into Pennsylvania or Western Pennsylvania.

Now, the indictment reads Youngstown, Ohio, but, again, I say to you the Government does not have to prove that it necessarily came from Youngstown, as long as this check came from Ohio into the district here in Western Pennsylvania.

Next, they have to prove, and, of course, all of these elements, as, again, I say to you, have to be proved to your satisfaction from the evidence presented here in the courtroom beyond a reasonable doubt. All right.

Now, the next point is that what was transported has to have been proved to have been a falsely made and forged security, a check 2441, drawn on the Dollar Savings and Trust Company, Youngstown, Ohio, upon the account of the L.I.U.N.A. Local 125, members savings account, and, of course, the [160-A] members' address is 319 West Rayen Avenue, Youngstown, Ohio, and payable in the amount of $6,706, which check was made payable to Don Allen Chevrolet Company and was signed by James Southland.

All right. Now, that has to be presented to you, the evidence in regard to that element, and you have to be

satisfied that that element is true from the facts presented beyond a reasonable doubt.

Now, finally, you have to be satisfied from the evidence and the facts presented here before you that the Defendant knew that this was a forged check; that he knew that this check was a falsely made and forged check.

Now, if you are satisfied that this Defendant knew the check was a bad check and there was enough evidence to support that which would convince you of that fact or element beyond a reasonable doubt, and if you find all of these elements, then you are entitled to find this Defendant guilty.

On the other hand, if any one of these elements is not proved to your satisfaction beyond a reasonable doubt, then you have to find this Defendant not guilty. In other words, if any one of the four elements that I mentioned are not proved to your satisfaction by the evidence presented here beyond a reasonable doubt, then you would find him not guilty.

On the other hand, if you find that each one of [161-A] these elements have been proved to your satisfaction by the evidence, beyond a reasonable doubt, then you would find him guilty.

All right. Now, I am going to go into further charging on these sections, but now I am going to go into Count 3. I am going to skip Count 2 temporarily because Count 3 is very similar to Count 1 and that has to do with the alleged bad check that was passed at the Rini Marine Sales, and you will notice I said "alleged bad check", because it is up to you to find out whether it was a bad check or not, not up to me, as a judge. It is your duty. You are the finders of the fact.

Now, here again, let me read Count 3 to you. Okay.

That beginning on or about December 12, 1978, in Youngstown, Ohio, and continuing thereafter in the Western District of Pennsylvania, Charles Ronald McElroy, also known as William Jones, did, with unlawful and fraudulent intent, transport and cause to be trans-

ported in interstate commerce from Youngstown, Ohio, to the Western District of Pennsylvania, a certain falsely made and forged security, to wit, Check No. 2426, drawn on the Dollar Savings and Trust Company, Youngstown, Ohio, upon the account of L.I.U.N.A. Local 125, members savings account, 319 West Rayen, R-a-y-e-n, Avenue, Youngstown, Ohio, 44502, payable in the amount of $6,695, dated December 8, 1978, made payable to Rini Marine Sales/SVC [162-A] and signed James Southland, and the Defendant, Charles Ronald McElroy, also known as William Jones, then well knew the same to have been falsely made and forged.

Now, here again, the Government has the obligation to convince you with the evidence here beyond a reasonable doubt that the acts charged were commited by this Defendant, the Defendant sitting in front of you, with an unlawful and fraudulent intent.

Secondly, that this Defendant did transport or cause to be transported in interstate commerce and, again, I say the Government does not have to prove that this check came from Youngstown. It just came from some place in Ohio, and into the Western District of Pennsylvania, this described check. They have got to prove that it crossed the state line. Okay.

Thirdly, that it was the check that's described here, namely, Check No. 2426, drawn on this Dollar Savings and Trust Company, Youngstown, Ohio, and upon the account of L.I.U.N.A. Local 125, members savings account, 319 West Rayen Avenue, Youngstown, Ohio, 44502, and payable in the amount of $6,695, dated December 8, 1978, and made payable to Rini Marine Sales and signed by James Southland.

All those things have to be proved, again, beyond a reasonable doubt from the evidence presented here in the courtroom, but, now, the next element is that this Defendant [163-A] had to know at the time that when he brought that check across the state line that it was false, it was a false check, it was a counterfeited, forged

check; that if all those things are proved to your satisfaction from the evidence beyond a reasonable doubt, you find this man guilty.

On the other hand, if any one of these elements is not proved, then you could find him not guilty.

Now, let me get in some more detail here. Again, the same act that I have already mentioned, when I mentioned Count 1, applies here and I will repeat it again.

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce a falsely made, forged, altered or counterfeited security or tax stamp, knowing the same to have been falsely made, forged, altered or counterfeited, they commit a crime against the United States.

Now, as to Count 1 and Count 3, I have mentioned the four elements that have to be proved beyond a reasonable doubt in order to establish the offense in both 1 and 3. They have to do with the bad checks, the one against Don Allen Chevrolet, the other one having to do with Rini Marine Sales.

Now, let's talk about interstate commerce. The term "interstate commerce", that's very important here in this thing, because, as you recall from my reading of the applicable statute, it states: Whoever, with unlawful or fraudulent intent transports in interstate commerce. What does that mean?

[164-A] Well, that means any movement or transportation of these forged checks from one state into another, and it includes all continuing movements of said forged check while in the second state, in this case Pennsylvania, until the movement of said forged check has ceased.

Now, the Government must show that the checks were transported in interstate commerce in a forged condition. However, the transportation within the destination state here, Pennsylvania, may be considered transporta-

tion in interstate commerce if it is a continuation of the movement that began out of state.

The Government need not exclude every speculative possibility that the transportation may have been interrupted at some point, nor need the Government show each step in the security's movement in interstate commerce.

Now, if you believe that the Government has shown that the Defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part of interstate commerce. In other words, the check had to originate at sometime in Ohio and had to have been transported at sometime in Pennsylvania in order to effect interstate commerce. So the Government must prove this Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate commerce between Ohio and [165-A] Pennsylvania, but need not prove the place in Ohio from which the checks started or from where the Defendant started.

You understand this, now, I think. I have gone over it several times. I am trying to make certain you understand what I am trying to say.

I think we have covered the first and third counts rather thoroughly. I hope I have, anyway, and I certainly hope that you understand what we are trying to explain to you.

Now, let's talk about the second count.

Nor, remember, I had the two check counts together, first and third, and now we are speaking of the second count which has to do with the transportation of the Corvette automobile from the State of Pennsylvania back into Ohio. Remember the checks were coming from Ohio to Pennsylvania in Counts 1 and 3.

In Count 2, the car is going from Pennsylvania and Don Allen's Chevrolet into Ohio, as claims the Government. Of course, these are allegations.

Now, here, I am going to read for you again the Count 2, which is very short and brief. That on or about October 17, 1978, this is Count 2, Charles Ronald McElroy, also known as William Jones, transported in interstate commerce a stolen motor vehicle, that is, a 1974 Chevrolet Corvette, V.I.N. 1237J 45421650, from the Western District of Pennsylvania [166-A] to the State of Ohio, and he then knew the motor vehicle to have been stolen. And this is in violation of Title 18, United States Code, Section 2312, which reads in its pertinent part: Whoever transports in interstate commerce a motor vehicle, knowing the same to have been stolen, shall be guilty of an offense against the United States.

Now, to establish this offense of interstate transportation of a stolen vehicle, there are two essential elements which must be proved beyond a reasonable doubt. First, the act or acts of transporting or causing to be transported in interstate commerce a stolen motor vehicle, as described in the indictment, and, again, you will recall, as I have already told you, what interstate commerce was, and I have given you a thorough analyis of that, of those words, and that this particular Defendant had to do this willfully and with the knowledge that the motor vehicle has been stolen.

Now, the offense is complete when these two elements are established beyond a reasonable doubt by the evidence in the case. The proof need not show who may have stolen the motor vehicle. The word "stolen" as used in this statute includes all wrongful and dishonest transportation of motor vehicles with the intent to deprive the owner of the rights of benefit of ownership, so I would have to charge you that if a person did in fact obtain an automobile with the use of a bad check, that car, in contemplation of this law, would be [167-A] stolen.

Now, on the other hand, if it is found that this car was transferred with proper consideration and it was paid for, it would not be stolen, but if it is obtained in any fraudulent way, due to deception or just outright theft, it is stolen, but in this instance the evidence, of

course, is, as I recall it, but your recollection counts, that this car was obtained through the use of what is generally known by all of us as a bad check. You understand what that is and that is what this is.

All right. Now, again, I will tell you interstate commerce means commerce between one state and another state, and if a motor vehicle is driven under its own power and across the state line from one state to another, it has been transported in interstate commerce, and if it is carried over by any means from one state to another, it is, in fact, transported in interstate commerce.

Now, I think that sums up the various counts.

Now, I would like to say another thing in regard to this Count 2, however, that there is no direct evidence that the Chevrolet Corvette, which is the subject matter of this second count, was ever taken from Pennsylvania into Ohio. However, there is evidence presented by the Government, in my view, —again, it is your recollection that counts. Don't take my recollection for anything. But in my view there is [168-A] circumstantial evidence that there was a car that was taken from Pennsylvania into Ohio, but there was no direct evidence of that. It is all circumstantial, and if you find that this circumstantial evidence does not convince you of this fact beyond a reasonable doubt, you would find this Defendant not guilty.

On the other hand, if the circumstantial evidence, as you view it, you believe it, does convince all of you beyond a reasonable doubt that, in fact, the car was taken from Pennsylvania into Ohio, then you would find this Defendant guilty.

All right. Now, when you retire, I suggest that you elect a foreman and whoever you wish. It is up to the 12 of you. And you may want to elect a secretary, too, to take notes, if you wish, but that's entirely up to you, but, in any event, you want to proceed in a businesslike manner to determine the guilt or innocence of the Defendant here.

For example, you might want to start and say, okay, well, let's take up Count 1, and then we might want to take up Count 3, since they're similar, and then you might want to take up Count 2. It is up to you, however you want to do it, but just as a suggestion, be systematic, be organized in your presentation with each other as to the consideration of these three counts, and, in any event, the foreman will preside over deliberation and he will be your spokesman here [169-A] in court, and by that, you know, everybody cannot intelligently in any group where you have more than one person, if everybody is talking together, it is hard to communicate, so the foreman will sort of preside like a president at a social meeting, and so give everybody a chance to express himself and keep some semblance of order going on while your deliberations are in progress, but, anyway, it is your duty as jurors to talk to each other, to consult with each other, to keep an open mind, to deliberate with a view toward reaching a unanimous agreement, if you can, of course, do so without doing violence to your individual judgment.

If you are in your own mind convinced, for example, that some of these elements are not proved to your satisfaction beyond a reasonable doubt, you should not give in merely just to avoid something that's disagreeable or just to get home.

On the other hand, if you can be persuaded reasonably and rationally that the other fellow's view is correct, then you ought to agree, if that is true and if you are convinced beyond a reasonable doubt in your own mind with the evidence presented that all the elements that are necessary here are properly proved.

Now, you got to decide for yourself, but do this only after hearing all of the discussion. Give every person a chance to express himself or herself first before you actually make up your mind, and don't hesitate to reexamine [170-A] your own views and change your opinion if you are convinced it is erroneous.

A lot of times we hear something and we say, well, that sounds pretty good, and later on we are convinced with other counterarguments that maybe what we thought was good was not as good as we thought it was, but, anyway, don't be afraid to change your mind or your views, but do not surrender your honest convictions as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of getting finished and returning a verdict. But, in any event, you have to reconcile the evidence and talk to each other, explain your points of view each to the other, and collectively come out with a verdict that's just under all the circumstances.

Now, if it becomes necessary to communicate with the bailiff, you can send a note signed by your foreman and we will try to communicate with you properly. We will have you back in the courtroom, but we will not accept any oral communications at all. The only thing we will accept from you, if you want a restating of any of these elements, if you want to understand, want the Court to tell you about something you don't understand, communicate with a writing, a piece of paper and a pencil. Otherwise, we will not communicate with you under any circumstances. Of course, orally in open court, I can hear from you, but other than that, I will not [171-A] accept any oral communications from the jury room through anybody or directly to me.

Now, the bailiffs, the people who will accompany you while you are deliberating on this are forbidden from communicating with you and don't communicate with them and, in any event, don't discuss any of the merits of the case while you're outside the jury room, and you are going to go get lunch here shortly, and I don't want you to discuss this case while you are on your lunch break or in the halls. Wait. Hold. Discipline yourself until you get back in here where you can relax and you can sit down systematically to examine the facts of the case and come out to a just verdict.

Another thing I think that's very important is that you should not reveal to any person, even the Court, how you stand numerically or otherwise on a question of guilt or innocence of the accused until after you have reached your unanimous verdict and it has been received by the Court. Don't let anybody know that maybe it is a 9 to 3 or 8 to 4 or whatever it might be. No one should know this except the 12 of you who will be deliberating in this case.

Now, when you have completed your deliberations, your secretary will fill in the verdict slip. We are going to give you a verdict slip to take out with you and there is space there for 12 signatures. I think all of you know that you cannot return a verdict on any count unless it is agreed to [172-A] by all of you unanimously. In other words, you have to unanimously come to an agreement.

Now, if you find the Defendant guilty of the offense charged in the indictment, you will so state on the verdict slip. If you find the Defendant not guilty of the offense charged, you will write on the verdict slip, in the space provided, not guilty, and you are to consider each charge of the indictment separately.

Now, on here you have Count 1. You have a "guilty" and a space and you have "not guilty" and a space; and Count 2, there is a space where you can put an "X" for guilty, or, opposite there is a "not guilty". On Count 3 there is a space that you can check guilty or not guilty, as the case might be, and then there is a place for all 12 of you to sign, and I think—does this meet with the approval of the attorneys? Do you want to look at it?

MR. LACKEY: Yes, Your Honor. Yes, Your Honor.

MR. GARRETT: It is all right with me.

THE COURT: Is it agreeable, gentlemen?

MR. LACKEY: Yes, Your Honor.

MR. GARRETT: Yes, sir.

THE COURT: All right. Now, at this point we would like to summon the bailiff and the marshall here so we can swear them.

THE CLERK: I will have to find them.

[173-A] THE COURT: Would you do that, please. I think they're outside the courtroom door.

MR. LACKEY: Could we have a side bar at this point for corrections and additions?

THE COURT: Yes, you may. Yes, you may.

(Whereupon, the following proceedings were held at side bar.)

THE COURT: Do you have any exceptions to the charge at this point?

MR. LACKEY: Okay. I believe that we have to preserve our exception to the points for charge again. Except the failure to read Points for Charge 1, 2 and 3.

As far as any exceptions, I have none. I only thought that at one point there may have been—you mentioned that the jury could convict or one of the elements was that the car must have moved in interstate commerce in Ohio and that you said if they found that it moved in interstate commerce in Pennsylvania, that would be enough. I would suggest that the jury be told that the Government must prove beyond a reasonable doubt that Mr. McElroy caused the transportation of the checks from Ohio to Pennsylvania in Counts 1 and 3, just to clear up a possible misconception.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2516

UNITED STATES OF AMERICA, APPELLEE

v.

CHARLES RONALD MCELROY, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 79-00032)

Argued March 21, 1980

Before: SEITZ, *Chief Judge*,
GARTH and HIGGINBOTHAM, *Circuit Judges*

Argued In Banc November 17, 1980

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS
GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

(Opinion filed March 17, 1981)

OPINION OF THE COURT

WEIS, *Circuit Judge.*

The National Stolen Property Act prohibits the transportation in interstate commerce of forged checks. In this appeal, the defendant argues that the prosecution had to prove that the checks were altered before they

were taken over a state line. We conclude that if an unauthorized signature is placed on a check at any point during interstate movement, either before or after a state border is crossed, the statute has been violated. We find sufficient evidence to support the convictions on two counts charging such offenses. We do not, however, find adequate evidentiary support for a conviction alleging a violation of the Dyer Act and direct an acquittal on that count.

The defendant was indicted for transporting two forged checks from Youngstown, Ohio, to western Pennsylvania in violation of 18 U.S.C. § 2314 (1976) (counts I & III). In addition, he was charged with transporting a stolen automobile from Pennsylvania to Ohio in violation of 18 U.S.C. § 2312 (1976) (count II). A jury returned guilty verdicts on all three counts, and the court imposed concurrent sentences.

The checks forming the basis of the indictment were drawn on the Dollar Savings & Trust Company of Youngstown, Ohio, and had been stolen from a labor union in that city in early 1977. On discovery of the theft, the account was closed.

In October 1978, the defendant appeared at the Don Allen Chevrolet agency in Pittsburgh, Pennsylvania, and ordered an automobile for $6,706. He said his home was in Warrensville Heights, Ohio, and that he would return the following day with a credit union check in payment. He reappeared as promised and said that the car was to be titled in Ohio, signed forms to that effect, and tendered a check on the Dollar Savings Bank of Youngstown already drawn in the amount of $6,909. The car was delivered to the defendant, and he drove off. The check was one of those stolen from the union, and the signature was forged. The Don Allen Company called the Youngstown bank the following morning and learned that the union account had been closed, so no attempt was made to negotiate the check.

The evidence applicable to count III of the indictment revealed a similar method of operation. In December 1978, the defendant went to Rini Boat Sales in Beaver, Pennsylvania, and inquired about purchasing a boat. He telephoned a week later and told the dealer that he was going to buy a boat and trailer, but had to get a check from his credit union. He telephoned again on the evening of the same day and asked the proprietor to wait, stating that he was at rest stop on the Ohio Turnpike.

The defendant arrived at Rini Boat Sales in a pickup truck bearing Ohio plates that he said was owned by a friend. He delivered a check already imprinted by a check writing machine. The defendant was given a certificate stating that the trailer was to be registered in Ohio and drove away with the boat and trailer. This check also had been stolen from the union and the signature forged. The proprietor telephoned the Youngstown bank the following morning and, learning that the account had been closed, made no attempt to cash the check.

Count II of the indictment charged that the defendant transported the car he had stolen from Don Allen to Ohio. There was no direct evidence to show where the car was driven after it left the dealer's premises in Pittsburgh.

Common to all three counts was the testimony of an FBI agent that the defendant admitted living in East Liverpool, Ohio, during the time the checks were delivered to the auto and boat dealers.

I. THE FORGED CHECK COUNTS

The defense concedes that the only issue before us is whether the interstate commerce requirement for federal criminal jurisdiction has been satisfied. This issue is purely one of statutory interpretation, no contention having been made that a commerce clause nexus would fail

to satisfy constitutional prerequisites for federal jurisdiction.

In pertinent part, 18 U.S.C. § 2314 states, "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any . . . forged . . . securities . . ., knowing the same to have been . . . forged . . . [s]hall be fined . . . or imprisoned . . . or both." [1] Section 10 of the same title provides, in part, "The term 'interstate commerce', as used in this title, includes commerce between one State . . . and another State. . . ."

The defendant contends that to convict, the prosecution had to show that the check was forged before it crossed a state line. The government argues that if the check was taken from Ohio to Pennsylvania, even if the actual forgery occurred in the latter state, the violation was complete because the interstate character of the transportation persisted.

The trial court accepted the government's position and charged that "transportation within the destination state here, Pennsylvania, may be considered transportation in interstate commerce if it is a continuation of the movement that began out of state."

There is surprisingly little variety to the case law applying § 2314 to forged check transactions. Most opinions hold that the interstate commerce requirement is satisfied if, after the defendant negotiates a forged check, it travels interstate in the bank collection process. *See, e.g., Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Newson*, 531 F.2d 979 (10th Cir. 1976). "There is no requirement of actual physical transportation by a defendant and it is sufficient that a defendant cause the instrument to be transported by the negotiation process." *Id.* at 981; 18 U.S.C. § 2(b) (1976). To the same effect, see *United States* v. *Sciortino*, 601 F.2d 680, 683 (2d Cir. 1979); *United States* v. *Duffy*, 393 F.2d 121, 122 (7th Cir. 1968). As the Court of Appeals

[1] 18 U.S.C. § 2311 (1976) provides that the term "securities" includes "any . . . check."

for the Tenth Circuit pointed out in *Newson*, "The essence of the offense is the fraudulent scheme itself and the interstate element is only included to provide a constitutional basis for the exercise of federal jurisdiction." 531 F.2d at 98.

An alternative method of proof emerged from another line of cases beginning with *Castle* v. *United States*, 287 F.2d 657 (5th Cir. 1961). There, the government proved that the defendant forged money orders in Pennsylvania and later cashed them in Texas. No question was raised about the applicability of § 2314 in that factual setting, and there is no doubt that the interstate commerce aspect was satisfied.

By the curious metamorphosis sometimes seen in decisional law, some courts have built *Castle* into a doctrine requiring that if the check was not collected through the interstate banking system, the prosecution must prove that the securities were forged before being transported over a state line. A coincidence of fact in *Castle* thus became a jurisdictional element of prosecution. For example, in *United States* v. *Owens*, 460 F.2d 467 (5th Cir. 1972), the court held, without analysis of the jurisdictional phase of the statute, that if the forgery of money orders occurred in Louisiana where there was an attempt to cash them, no offense under § 2314 had occurred even though the money orders had been stolen in New Jersey.

We note an important factual distinction between *Owens* and this case. In the former there was no evidence to show that the defendant, a seventeen year-old, had transported the money orders, in altered or unaltered form, from New Jersey to Louisiana. Here, by contrast, there is testimony to support findings of interstate journeys by the defendant from Ohio to Pennsylvania for the purpose of engaging in a commercial transaction, during which he had the checks in his possession. *See* pp. 9-10 *infra*.

Nevertheless, the *Owens* opinion makes clear that the court believed the government was required to prove that the money orders had been forged in New Jersey, "prior to their interstate transportation." *Id.* at 471. And other courts of appeals reading *Owens* this broadly have followed it without any examination of its validity. *See United States* v. *Sparrow*, —— F.2d ——, No. 78-2017 (10th Cir. Dec. 2, 1980) (in banc); *United States* v. *Hilyer*, 543 F.2d 41 (8th Cir. 1976). *See also United States* v. *Lee*, 485 F.2d 41 (4th Cir. 1973). It is this line of cases that the defendant urges upon us here.

We begin by examining the history and language of § 2314. It derives from § 3 of the National Stolen Property Act. Ch. 333, 48 Stat. 794 (1934). In *United States* v. *Sheridan*, 329 U.S. 379 (1946), the Court emphasized that the Act established a scheme of federal-state cooperation designed to apprehend and punish criminals "whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent." *Id.* at 384. The Court also said that the transportation of forged checks is not to be torn from its setting and given a status distinct from other forbidden transportations. "The legislative history shows that the purpose [(of the Act)] was to bring operators in these false securities into substantially the same reach of federal power as applied to others dealing in stolen goods, securities and money." *Id.* at 389. We may, therefore, look to decisions under other sections of the Act as an aid in construing the meaning of transportation in interstate commerce.

The language of § 2314 does not state that the checks must be forged before interstate transportation begins. Transportation in interstate commerce has a broader meaning.[2]

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[2] Neither the courts nor the commentators have thoroughly examined the significance of the title-wide definition of interstate commerce in 18 U.S.C. § 10. The courts have examined the defini-

The fraudulent acts proscribed by the statute do not pose any threat peculiar to interstate, as contrasted with intrastate, activity, and it is obvious that the prohibited activities were already the subject of state criminal statutes. As the Court pointed out in *Sheridan*, the purpose of the National Stolen Property Act is to provide federal assistance in what previously had been exclusively state affairs. Legislative modifications in the Act have not altered this conclusion. *See United States* v. *Patten*, 345 F. Supp. 967, 968 (D.P.R. 1972) The interstate commerce language was included purely for jurisdictional purposes and should be construed to carry out this congressional intention. *United States* v. *Ludwig*, 523 F.2d 705 (8th Cir. 1975, *cert. denied*, 423 U.S. 1076 (1976); *see Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Bass*, 404 U.S. 336 (1971).

A person who travels from one state to another for the purpose of purchasing an article in the destination state is moving in interstate commerce, and the character of such a trip does not cease upon entering the destination state. It continues until the purpose of the journey has been achieved—indeed, more likely until a return has been made to the point of origin. Understandably, therefore, the courts have found interstate movement both before and after a state line has been crossed.

A persuasive illustration of federal jurisdiction attaching before movement over a border may be found in an opinion examining the analogous title 18 concept of foreign commerce. *See* 18 U.S.C. § 10. In *United States*

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tion in relation to the particular offense charged, and the commentators have been more concerned with how far Congress might go, rather than with how far it has gone. *See, e.g.*, Pauley, *An Analysis of Some Aspects of Jurisdiction under S. 1437, the Proposed Federal Criminal Code*, 47 GEO. WASH. L. REV. 475 (1979); Quigley, *The Federal Criminal Code Revision Plan: An Epitaph For The Well-Buried Dead, id.* at 459; Stern, *The Commerce Clause Revisited—The Federalization Of Interstate Crime*, 15 ARIZ. L. REV. 271 (1973); and Note, *The Scope Of Federal Criminal Jurisdiction Under The Commerce Clause*, 1972 L. FORUM 805.

v. *Ajlouny*, 629 F.2d 830 (2d Cir. 1980), *cert. denied*, —— U.S. ——, 49 U.S.L.W. 3515 (Jan. 19, 1981), cargo originating in New York and destined for Doha, Qatar, was seized in a customs control area of a Brooklyn pier. Holding that the cargo was in foreign commerce under § 2314 even though it had not moved beyond the borders of the United States—or for that matter the state—the court stated, "Congress was not aiming only at stolen goods moving across a technical boundary line but also wanted to reach shipments in the course of such a crossing . . . ." *Id.* at 837.

The continuing presence of federal jurisdiction after a state line crossing was examined in *United States* v. *Tobin*, 576 F.2d 687 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). There the court construed a companion section of the National Stolen Property Act, 18 U.S.C. § 2315 (1976). That section speaks of stolen goods "moving as, or which are a part of, or which constitute interstate or foreign commerce." Although this language differs from that in § 2314, we find no reason to apply a different meaning in the factual context presented here. In *Tobin* the court held that so long as the movement of stolen items within the destination state can be considered a continuation of the movement that began out of state, the prerequisite of § 2315 jurisdiction was met.

Tobin was cited with approval in *United States* v. *Garber*, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, —— U.S. ——, 49 U.S.L.W. 3483 (Jan. 18, 1981), where we held that a 28 day delay after arrival in a destination state did not require a finding that goods had come to rest for the purposes of a prosecution under 18 U.S.C. § 659, a statute with jurisdictional language almost identical to that in § 2315. Thus, under the National Stolen Property Act, the interstate commerce prerequisite may be satisfied even before a state border is crossed and may continue some time thereafter in the destination state.

In this case, therefore, a trip by the defendant from Ohio to Pennsylvania to transact business would put him in interstate commerce. The nature of this movement did not change the instant he crossed the border into Pennsylvania. At the very least, it continued until he completed his business transactions in the destination state. At some time during this travel, the defendant transported the checks in a forged condition and later delivered them to the car and boat dealers. It is immaterial whether the signatures were forged in Ohio or in Pennsylvania. If at any point in the interstate movement the check was in a forged condition, the statute was satisfied. We conclude, therefore, that the district court's charge to the jury was not erroneous.

The defendant argues, however, that the evidence is insufficient to establish any transportation of the checks in altered or unaltered form, much less interstate transit. In passing on this contention, we must sustain the verdict if there is substantial evidence to support it. Of course the evidence must be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

There was testimony that the defendant lived in Ohio, that he told the auto salesman that he intended to get a check from his credit union, and that he wanted the car titled in Ohio. When the defendant returned to Don Allen's, he did so in an automobile, thus establishing his ability to travel the short distance between Pittsburgh and the Ohio border. The check he presented was drawn on an Ohio bank. In the case of the boat purchase, there is the additional fact of a telephone call from the defendant in which he stated he was on the Ohio Turnpike enroute to Beaver, Pennsylvania. Moreover, he arrived in a vehicle bearing Ohio license plates.

The checks had been stolen in Ohio. From the evidence, no inference could be drawn that the checks were in Pennsylvania before the defendant made the

trips from Ohio, and unsupported speculation of that nature does not require the convictions be set aside. As we pointed out in another § 2314 prosecution, *United States* v. *Blair*, 456 F.2d 514, 517 n.3 (3d Cir. 1972), the proposition that the government's evidence must exclude every reasonable hypothesis inconsistent with guilt was rejected in *United States* v. *Allard*, 240 F.2d 840 (3d Cir.), *cert. denied*, 353 U.S. 939 (1957). We continue to adhere to that position, and "[t]he circumstantial nature of the evidence does not alter [our] conclusion." *United States* v. *Hamilton*, 457 F.2d 95, 98 (3d Cir. 1972); *United States* v. *Blair*, *supra* at 518.

The jury was free to find that on each occasion the defendant made a trip from Ohio to Pennsylvania, carrying with him a check that was forged either in Ohio or Pennsylvania, but in any event before the interstate travel terminated. *Cf. United States* v. *Presler*, 610 F.2d 1206, 1212-13 (4th Cir. 1976) (no evidence, direct or circumstantial, indicated that defendant actually made interstate journey). We therefore conclude that the judgment on counts I and III must be affirmed.

II. THE AUTO THEFT COUNT

Section 2312 of title 18 prohibits the transportation in interstate commerce of a stolen motor vehicle. Here it is alleged that the defendant stole the automobile from Don Allen when he gave a worthless check in payment.[3] Again, the defendant challenges the sufficiency of the government's evidence of transportation in interstate commerce because the auto was never seen in Ohio.

The concept of transportation in interstate commerce carries the same jurisdictional significance here as it does with respect to § 2314. For similar reasons, it

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[3] Acquiring possession of a vehicle in this fashion renders it "stolen" within the meaning of the Dyer Act. United States v. Wilson, 436 F.2d 122, 124 (3d Cir.), *cert. denied*, 402 U.S. 912 (1971).

would not have been necessary for the government to prove that the automobile crossed the Ohio-Pennsylvania border. Like the United States Court of Appeals for the Fifth Circuit,

> "[w]e think the offense does not necessarily require the actual, physical driving *across* a state line by the accused. The offense is interstate transportation and, assuming the presence of the requisite knowledge and guilty purpose, any driving, whether wholly within the state of origin, state of destination, or from and to, if done as a substantial step in the furtherance of the intended interstate journey is, we think, within the act."

Barfield v. *United States*, 229 F.2d 936, 939 (5th Cir. 1956).

Nevertheless, the jury was instructed, without objection from the government, that to convict it had to be satisfied that the car was driven "across the state line from one state to another." We find that there is insufficient evidence to support the defendant's conviction under this instruction. There is no evidence of record that the automobile was ever taken to Ohio. The vehicle was never seen after it left Don Allen's lot.

It may be argued that the jury could have found the defendant intended to title the car in Ohio, and perhaps infer from the fact that he lived there that he would take it home with him. Nevertheless, we conclude that this is insufficient to establish the fact that the car was actually driven into Ohio. Since the record is completely silent on this point, we conclude that, under the instruction given, the evidence was insufficient to support count II, and therefore, that charge should not have been submitted to the jury. The government's failure to object to this instruction bars a retrial under proper instructions, Fed. R. Crim. P. 30, so we must direct an acquittal, *see Burks* v. *United States*, 437 U.S. 1 (1978).

Accordingly, the judgments on counts I and III will be affirmed. The judgment on count II will be vacated, and the matter will be remanded to the district court for the entry of judgment of acquittal.

ADAMS, *Circuit Judge*, with whom Chief Judge Seitz joins, concurring in part and dissenting in part.

I concur with the majority's affirmance of McElroy's conviction for transporting forged checks in interstate commerce. I find, however, that I must part company with the majority when it reverses McElroy's conviction under the Dyer Act, 18 U.S.C. § 2312.

Three elements comprise the offense of interstate transportation of stolen motor vehicles, the offense embodied in the Dyer Act. The government must establish (1) that the vehicle was stolen; (2) that the defendant transported it in interstate commerce; and (3) that the defendant knew, at the time he transported it, that the vehicle had been stolen. *See United States* v. *Gresham*, 585 F.2d 103, 106 (5th Cir. 1978). There is no challenge to the sufficiency of the government's proof of the first and third elements. An automobile purchased with a worthless check is "stolen" for purposes of the Dyer Act, *see United States* v. *Turley*, 352 U.S. 407, 416 (1957). Moreover, possession of the vehicle may be sufficient for the jury to draw the inference of guilty knowledge, *see Barfield* v. *United States*, 229 F.2d 936, 939 (5th Cir. 1956). Because McElroy had possession of the automobile when he drove off with it from Don Allen Chevrolet, he may be presumed, in the absence of an exculpatory explanation, to have had knowledge that the car was stolen.

The only remaining issue is whether the jury might have inferred from the evidence in the record that McElroy injected the stolen automobile into the stream of interstate commerce. The majority acknowledges that

the prosecution, in order to make out this component of the offense, need not show that the defendant was in control of the vehicle at the time it crossed a state boundary, or even that the car actually moved from one state into another. As long as the defendant inaugurated an intended interstate journey, he has violated the Act. Nonetheless, the majority apparently concludes that the evidence in the case at bar fails to demonstrate that McElroy's automobile, stolen in Pennsylvania, was ever bound for Ohio.

Although the issue is not completely free from doubt, I would hold that the government proffered adequate evidence to support the jury's verdict. When McElroy obtained the car from Don Allen Chevrolet in Pittsburgh, he advised the salesman that he lived in Ohio and that he intended to register the automobile in Ohio. McElroy paid for the car with checks stolen from a union office in Youngstown, Ohio. After his arrest, McElroy admitted to an FBI agent that, at the time of the alleged offense, he resided in East Liverpool, Ohio. In addition, the evidence at trial indicated that, after obtaining the Corvette, McElroy returned to Ohio and some time later ventured back into Pennsylvania to purchase a boat with another stolen check.

Admittedly, these items of evidence do not show conclusively that McElroy drove the stolen vehicle into Ohio. But a court reviewing a jury verdict must regard the evidence in the light most favorable to the government, *see Glasser* v. *United States*, 315 U.S. 60, 80 (1942), and must accept as established all reasonable inferences that tend to support the jury's determination, *see United States* v. *Briddle*, 430 F.2d 1335, 1337-38 (8th Cir. 1970). I believe that the evidence of record provides a sufficient basis from which a jury might infer that, at the time McElroy departed from the Pittsburgh automobile dealer, he contemplated driving the stolen vehicle into the State of Ohio. Moreover, while it may be argued that the facts are consistent with a design on the

part of McElroy to use the automobile exclusively in Pennsylvania, and perhaps to dispose of it there, the record is completely barren of any evidence to show that this was McElroy's intent.

The majority correctly points out that the trial judge's instructions may have led the jury to believe that, in order to convict, they would have to satisfy themselves that the stolen vehicle actually crossed the border between Pennsylvania and Ohio. Under the majority's own interpretation of the Dyer Act, this instruction probably misconstrued § 2312 to the advantage of the defendant. But while the government's failure to make timely objection might preclude it from taking exception to the instruction before this Court, I do not agree with the majority that the prosecutor's silence should affect our disposition of McElroy's claim to have been convicted on insufficient evidence. In light of the trial judge's charge, the verdict manifests the jurors' conclusion that McElroy transported the stolen car into Ohio. *A fortiori*, the verdict reflects the judgment, logically entailed from the crossing of state lines, that McElroy inaugurated an interstate journey. Because proof of this latter proposition suffices to establish the interstate transportation element of the Dyer Act, and because, in my opinion, the jury could properly infer from the evidence that McElroy embarked on an interstate venture, I would not disturb the jury's conclusion that McElroy violated § 2312.

Accordingly, I dissent from Part II of the majority opinion.

GARTH, concurring and dissenting.

I concur with the majority's decision to vacate McElroy's conviction and to enter a judgment of acquittal on Count II. I dissent from the majority's affirmance of McElroy's convictions on Counts I and III.

I.

The clarification of the requirements necessary to support a conviction under 18 U.S.C. § 2314 (1976) is of overriding concern in this case. In relevant part, § 2314 reads:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamp, knowing the same to have been falsely made, forged, altered, or counterfeited . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The majority opinion in analyzing the statute, focuses only on the issue of whether the checks involved had to be forged before they crossed from one state (here Ohio) to another state (here Pennsylvania). The majority of this court disagrees with the recent Tenth Circuit *en banc* decision, *United States* v. *Sparrow*, No. 78-2017 (10th Cir. December 3, 1980) (*en banc*) *reversing United States* v. *Sparrow*, 614 F.2d 229 (10th Cir. 1980), which held that the statute required proof that the checks was already forged at the time they crossed the state line. The majority here holds that "[i]f at any point in the interstate movement the check was in a forged condition, the statute was satisfied." Maj. op. at 9.

To this point I am in full agreement with my colleagues who form the majority, for I too agree that the checks do not have to be in a forged condition when they cross from one state to another. In my view it is immaterial in which state the checks were forged, providing they ultimately are found to be forged instruments in a state different from the state where they originated.

Thus, to this extent I too adhere to the "anti-*Sparrow*" construction announced today by the majority. However, adherence to this interpretation cannot end our inquiry in this case. By limiting its analysis to the

forgery element of the statute, i.e., the state in which the checks were forged, the majority has failed to address the element of § 2314 which requires proof that it was the defendant who transported the checks or who caused the checks to be transported in interstate commerce—in this case from Ohio to Pennsylvania.

Assuming[1] that I have read the majority's opinion

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[1] I am "assuming" that under the majority's analysis, which concentrates solely on the forgery element of the statute, evidence of forged checks drawn in Ohio but found in Pennsylvania would be sufficient to sustain a conviction. Thus, as I read the majority opinion, the "transporting" element of the statute is deemed to be subsumed within and satisfied by the "forgery" element. Yet I acknowledge that in addressing the sufficiency of the evidence, the majority opinion discusses inferences that a jury could draw that McElroy had brought (transported) the checks from Ohio to Pennsylvania. Maj. op at 9-10. If that discussion is intended to require proof of a *transporting* element as well as a *forgery* element, then I have no disagreement with the majority as to its standard, but only as to the sufficiency of the evidence applied to that standard. However, my reading of the majority opinion leads me to believe that it has erred in the standard to which it subscribes, because it has apparently by its construction, read out of § 2314 the element of "[w]hoever . . . transports in interstate . . . commerce."

The charge given by the district court in this case suffers from the same ambiguity and defect that I have found in the majority's analysis. Under the district court's charge, a jury could have found that the interstate commerce requirement was satisfied if the checks were drawn in Ohio (which is undisputed), found their way into Pennsylvania (which is undisputed), and were carried by McElroy *in* Pennsylvania (which is also undisputed), even though no proof existed that McElroy had transported the checks *from* Ohio *to* Pennsylvania. The district court charged at one point that:

> transportation within the destination state here, Pennsylvania, may be considered transportation in interstate commerce if it is a continuation of the movement that began out of state.

It then charged:

> Now, if you believe that the Government has shown that the Defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part

correctly in this respect, I am obliged to dissent from its analysis and the result which it has reached.

As I understand the current jurisprudence of § 2314, the cases interpreting the interstate requirement of that statute fall into two discrete groups.

The first of these are cases in which the interstate component is satisfied by the *negotiation* of a check drawn in one state and presented in another. In those cases, of which *United States* v. *Newson*, 531 F.2d 979 (10th Cir. 1976), is representative, the mere negotiation of a check is deemed to provide proof of interstate commerce because by the defendant's act of negotiation, a check clearance procedure which is interstate in scope, has been triggered. Thus the defendant in such cases has caused the check to be transported in interstate commerce, even though he himself has not physically transported the check from one state to another.

The second group of cases are those where the defendant has actually transported the check, whether in a forged or unforged condition, from one state to another, thus satisfying the interstate requirement. That situation is reflected in cases such as *United States* v. *Lewis*, 560 F.2d 901 (8th Cir. 1971); *United States* v. *Sparrow*,

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of interstate commerce. In other words, the check had to originate at sometime in Ohio and had to have been transported at sometime in Pennsylvania in order to effect interstate commerce. So the Government must prove this Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which the checks started or from where the Defendant started.

App. 234a-236a

It appears to me that the last paragraph of the charge which I quote above more closely resembles the position which I have taken than the position advocated by the majority, but when it is combined with the earlier quoted instruction, I suggest that the charge is not clear. Nowhere in the charge does there appear an unequivocal statement that McElroy himself had to transport the checks from Ohio to Pennsylvania.

supra. Thus, even adopting the "anti-*Sparrow*" interpretation which the majority adopts, I find no authority in the cases for dispensing with a need to prove in a case such as this one, that: (1) either the checks were caused to be transported by McElroy between Ohio and Pennsylvania, or (2) that McElroy with the checks travelled from Ohio to Pennsylvania.

In our present case, neither proof of negotiation nor proof of transportation in interstate commerce is present. Here no check has been negotiated through check clearance procedures. To the contrary, the proofs in Counts I and III reveal that upon receiving the checks, the boat and car dealers did not deposit them. In that sense the checks were never negotiated and this never satisfied the interstate requirement because they never became involved in check clearance procedures.[2]

Nor does the record disclose that McElroy actually carried or transported the checks from Ohio to Pennsylvania.[3] It is undisputed that the checks were drawn on an Ohio bank, and it is undisputed that McElroy possessed them in Pennsylvania, but the record is devoid of proof as to who brought the checks from Ohio to Penn-

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[2] It should not be forgotten that McElroy was not indicted for having caused the checks to be transported from Pennsylvania to Ohio, the route which the checks would have travelled had they entered the bank collection process in Pennsylvania. The indictments read "cause to be transported . . . from . . . Ohio, to . . . Pennsylvania. . . ." Moreover, the indictments are drawn in the conjunctive and thus would require proof by the government that McElroy transported *and* caused to be transported the forged checks in interstate commerce. The indictments both read in pertinent part:

> CHARLES RONALD McELROY a/k/a WILLIAM JONES, *did* with unlawful and fraudulent intent, *transport and cause to be transported in interstate commerce from* Youngstown, *Ohio*, to the Western District of *Pennsylvania*, a certain falsely made and forced security . . . (emphasis added)

[3] I recognize that as to this issue the majority differs with my view of the evidence.

sylvania, or indeed how they came into McElroy's possession in Pennsylvania.

As I read the record, there is not enough evidence for a jury to have found beyond a reasonable doubt, resolving all inferences in favor of the government, *see Jackson* v. *Virginia*, 443 U.S. 307 (1979), that McElroy transported the checks from Ohio to Pennsylvania. From all that can be determined from this record, McElroy at the times relevant to the events charged in this case, never left Pennsylvania. The record is completely equivocal as to how or where or from whom McElroy obtained the checks, and nothing appears in the record from which a jury could reasonably infer beyond a reasonable doubt that McElroy himself brought the checks from Ohio to Pennsylvania. The mere fact that McElroy made a telephone call to a dealer stating that he was in Ohio on the way to Pennsylvania is insufficient in my view to infer that he was indeed in Ohio at that time, particularly when there is testimony that he drove into the boat dealer's lot from a dead end street. App. at 77A. It is undisputed that McElroy deliberately misled the boat and car dealers in other respects. Thus, it is not reasonable to infer that his statements concerning his intentions to return to Ohio and his statements as to his then whereabouts were not made for the same purpose.

III.

Having found the evidence insufficient to sustain McElroy's conviction on Counts I and III, I would vacate the judgments of conviction and enter judgments of acquittal. When a conviction is vacated due to insufficient evidence, double jeopardy bars a retrial. *Burks* v. *United States*, 347 U.S. 1 (1978); *Hudson* v. *State of Louisiana*, 49 U.S.L.W. 4159 (Feb. 24, 1981). Even if the district court erroneously excluded evidence that would prove that McElroy had indeed transported the checks in interstate commerce, double jeopardy would prevent a

new trial. *Burks* states that "it should make no difference that the *reviewing* court rather than the trial court, determined the evidence to be insufficient." *Id.* at 11. If the district court had entered a judgment of acquittal in this case, the government would have had no right to appeal, even if the district court's decision was tainted by its erroneous exclusion of the government's evidence. *Sanabria* v. *United States*, 437 U.S. 54 (1978).

Thus, I fail to understand why an erroneous evidentiary ruling made by the district court should be deemed to have deprived the government of its "fair opportunity to offer whatever proof it could assemble." *Burks* at 16, quoted in *Hudson* v. *State of Louisiana*, 49 U.S.L.W. at 4160. While it is true that the government must have a fair opportunity to offer its proof, no case to my knowledge has gone so far as to hold that a district court's erroneous exclusion of government evidence may be claimed as a denial of that fair opportunity. Thus, in considering whether there is sufficient evidence to uphold the conviction, we are instructed to consider only the evidence admitted by the trial court. Since that evidence in this case is insufficient in my view, I conclude that a judgment of acquittal must be entered.

I would consequently vacate the convictions and direct the entry of judgments of acquittal on all three counts.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, concurring in part and dissenting in part.

I concur with so much of the majority's decision which vacates the judgment of conviction and the entry of a judgment of acquittal on Count Two. I dissent from the majority's affirmance of the convictions on Counts One and Three. Though Judge Weis has written a thoughtful opinion, I believe the views expressed by Judge McKay in *United States* v. *Sparrow*, —— F.2d ——, No. 78-2017, Typescript at 5-6 (10th Cir., Dec. 2,

1980) (in banc), express the correct statement of law as to 18 U.S. 2314:

> [T]he plain meaning of the statute requires the prosecution to show that the security was in a forged or altered condition at the time of its interstate passage. The rule is clear that a criminal statute is limited to its terms; it "must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States* v. *Enmons*, 410 U.S. 396, 411 (1973); see also *United States* v. *Campos-Serrano*, 404 U.S. 293, 297 (1971); *United States* v. *Fisher*, 456 F. 2d 1143, 1145 (10th Cir. 1972).

The three circuits which have interpreted this section have all given it this meaning. *See United States* v. *Sparrow; United States* v. *Hilyer*, 543 F.2d 41 8th Cir., 1976); *United States* v. *Owens*, 460 F.2d 467 (5th Cir. 1972). *Cf. United States* v. *Lee*, 485 F.2d 41 (4th Cir. 1977). Indeed, at oral argument in this case, the government conceded that the section under which McElroy was indicted required that the check be in a forged state when it crossed state lines.

In support of its interpretation, the majority relies on the broad purpose of the National Stolen Property Act "to bring operators in these fake securities into substantially the same reach of federal power as applied to others dealing in stolen goods, securities, and money." Majority Typescript Opinion at 7, *quoting United States* v. *Sheriden*, 329 U.S. 379, 389 (1946). I agree that the government possesses the authority under the Constitution and the Act to prosecute McElroy even though the check may not have been forged when it crossed state lines. But this broad purpose is satisfied by prosecution under other provisions of the Act. Section 18 U.S.C. 2314 also holds criminally liable any person who "with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or

counterfeiting any security or tax stamps. . . ." Transportation of the unsigned check by McElroy across state lines with the intent of forging it would have satisfied this standard, and the intent of the Act. Unfortunately, McElroy was not charged under this paragraph. Thus, the question we must address is not whether the federal government could have prosecuted McElroy under the Act for his actions, which it clearly could, but whether the specific section under which McElroy was indicted reached that activity.

On this question I believe there is some ambiguity. The wording of the section suggests, as other courts have held, that it is a forged check that must be transported across state lines, not a check that is later forged. Under the majority's analysis, on the other hand, if one individual transported an unforged check across state lines and handed it to a second person, who forged the check and carried it across the street, the second person could be convicted of *transportation* of a forged check in interstate commerce. This is a reasonable interpretation, but not the most apparent.

The majority's analogy to Section 2315 is not determinative. Section 2315 holds individuals liable for "receiving," "selling," or "storing" a forged security "moving as, or which is part of, or which constitute, interstate commerce." Unlike the act of "transportation," the "sale," "receipt" or "storage" of forgeries obviously cannot occur, except in unusual circumstances, across state lines. Thus, a broader interpretation of the special clause included in that section—"moving as, or which is part of, or which constitute"—is logical. No such broad interpretation is impelled by the language of Section 2314. Because criminal statutes must be "resolved in favor of lenity," I would interpret the prohibition on transporting a forged check in interstate commerce under Section 2314 to require movement of the forged check across state lines. Thus, as I see it, the district court judge's charge on Counts One and Three was improper.

Finally, I do not believe that the government should be prohibited from retrying the defendants on these two counts. From my review of the record, there was substantial evidence for a jury to infer that the check involved in Count Three had been forged before it was brought into Pennsylvania. Thus, retrial of the defendants on this count would not contravene the Double Jeopardy Clause. As to Count One, on the other hand, there was probably insufficient evidence, as a matter of law, for the jury to infer that the check had been forged before it entered interstate commerce. The absence of such evidence, however, is attributable to an unmeritorious objection made by the defendant which, in my opinion, was improperly sustained by the court. Its decision excluded evidence that had been proferred by the government to establish the transportation in interstate commerce jurisdictional nexus. Since the exclusion of this jurisdictional evidence on Count One was attributable solely to the defendant's objection, I would not find that another prosecution on Count One is prohibited by the Double Double Jeopardy Clause.[1]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[1] The Supreme Court's recent decisions in Hudson v. State of Louisiana, 49 U.S.L.W. 4159 (Feb. 24, 1981), and Burks v. United States, 437 U.S. 1 (1978), would not preclude retrial of the defendant. These cases merely hold "that a reversal 'due to a failure of proof at trial,' where the state received a 'fair opportunity to offer whatever proof it could assemble,' bars retrial on the same charge." Hudson v. State of Louisiana, 49 U.S.L.W. at 4160, *quoting* Burks v. United States, 437 U.S. at 16. In this case, the government did not have a "fair opportunity to offer whatever proof it could assemble."

SUPREME COURT OF THE UNITED STATES

No. 80-6680

CHARLES RONALD MCELROY, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question I presented by the petition.

October 5, 1981

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